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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 546.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY,  
APPELLANT,

vs.

LAURENCE B. FINN, GREEN GARRETT, AND WILLIAM  
KLAIR, INDIVIDUALLY AND AS CONSTITUTING THE  
RAILROAD COMMISSION OF KENTUCKY, ET AL.

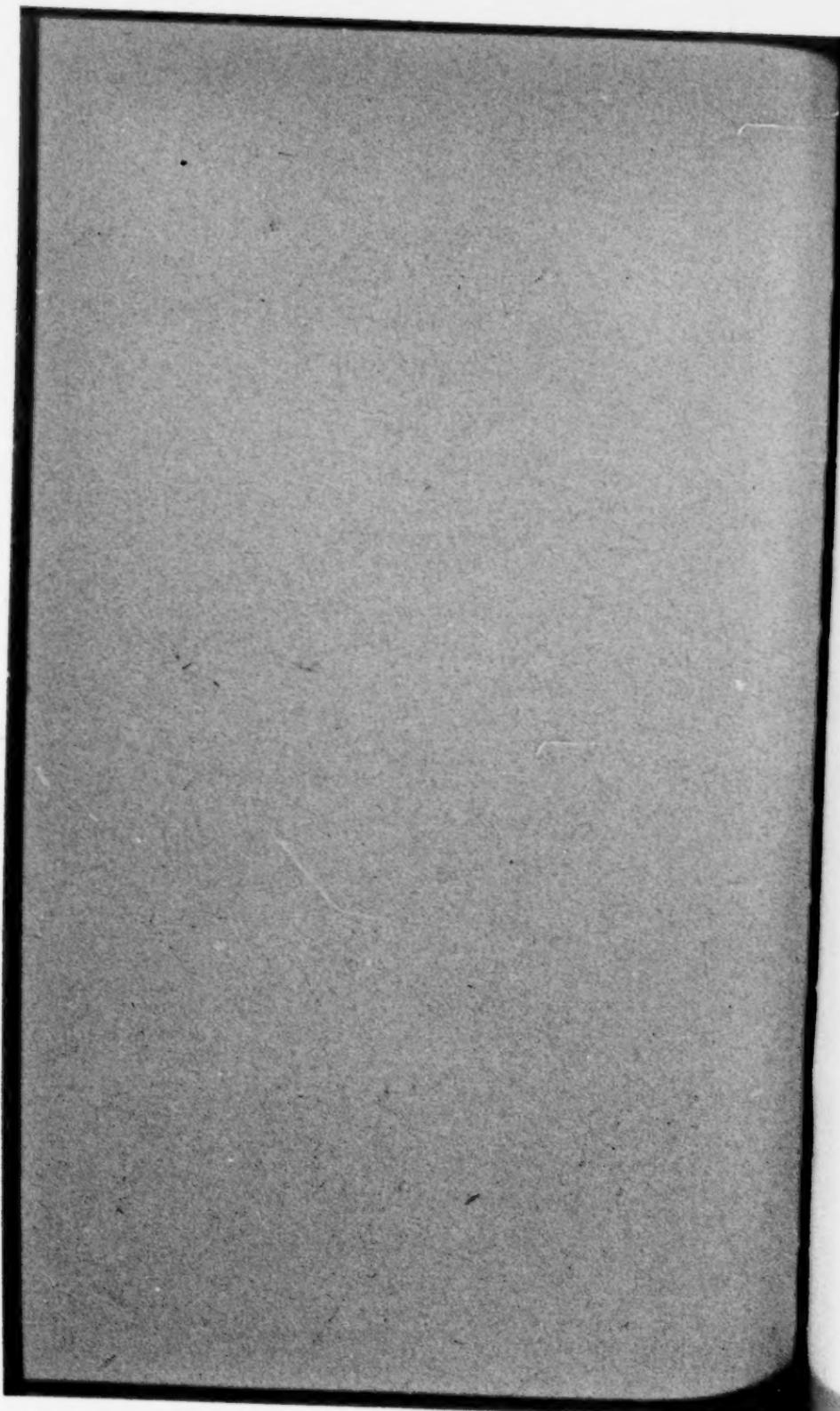
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF KENTUCKY.

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FILED JULY 2, 1914.

(24,290)



(24.290)

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*Citation.*

THE UNITED STATES OF AMERICA,  
*Eastern District of Kentucky, ss:*

United States District Court, Eastern District of Kentucky.

To Laurence B. Finn, Green Garrett, and William Klair, individually and as constituting the Railroad Commission of Kentucky, and Greenbrier Distilling Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kober, S. Grafelder & Co., Willow Springs Distilling Co., Wright and Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Eastern District of Kentucky, and filed in the Clerk's office of said Court on the Second day of June, A. D., 1914, in a cause wherein Louisville & Nashville Railroad Company is appellant, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, (the order denying appellant's application and motion for an interlocutory injunction in this case, rendered by this Court on May 14, 1914), as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand as Circuit Judge, Sitting by Designation as Judge of the said District Court, and the Seal of said Court, at Frankfort, this 2nd, day of June in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138th, year.

[Seal Eastern Kty. Dist. Court, United States of America.]

ARTHUR C. GUION,  
*Circuit Judge, Sitting by Designation as Judge of the U. S. District Court, Eastern District of Kentucky.*

In triplicate.

I hereby accept service of the within citation this 9th day of June, 1914.

J. V. NORMAN,

*For Appellees.*  
JAMES GORNELL,  
*Attorney General.*

Filed June 10, 1914. J. W. Menzies, U. S. Clerk.

1      THE UNITED STATES OF AMERICA,  
*Eastern District of Kentucky, ss:*

*Record of the Proceedings of the Circuit and District Courts of the United States within and for the Eastern District of Kentucky, Sitting at Frankfort, in the Cause and Matter Hereinafter Stated, and the Same Being Disposed of at a Regular Term of said District Court Begun and Held at the City of Frankfort, in said District, on the Second Monday in March, Being the Ninth Day of said Month, A. D. 1914, to wit, on the 14th Day of May, A. D. 1914.*

Present: Hon. John W. Warrington, circuit judge, specially designated to sit in this case, and Hon. Arthur C. Denison, district judge, and Hon. Edward T. Sanford, district judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky.

Said action was commenced on the 7th day of September, A. D., 1910, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

On the 7th day of September, A. D., 1910, bill of complaint was filed in said cause, which said bill is in words and figures as follows, viz:—

In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,  
versus

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Bill of Complaint.*

To the Judges of the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky:

The complainant, the Louisville and Nashville Railroad Company, brings this, its Bill of Complaint, against Adam T. 2 Siler, Lawrence B. Finn, and Lew P. Tarlton, who compose what is known as the Railroad Commission of Kentucky, and thereupon your Complainant says:

## I.

That it is a corporation duly created, chartered, organized and existing under the laws of the State of Kentucky, having its principal office and place of business in the City of Louisville, County of Jefferson, State of Kentucky; that it is a citizen and resident of said State, and by virtue of its charter and the amendments thereto it has and had at the dates hereinafter mentioned power to sue and be sued, to contract and be contracted with, and to construct, own, lease, control, maintain and operate steam railroads in the State of Kentucky and in other States as a common carrier of intrastate and interstate freight and passengers; and that the amount in controversy in this cause exceeds the sum or value of Two Thousand Dollars, exclusive of interest or costs.

## II.

That the defendants, Adam T. Siler, Lawrence B. Finn, and L. P. Tarlton, are, and each of them is, a citizen and resident of the State of Kentucky, and the said defendants are the duly elected, qualified and acting members of and do constitute the Railroad Commission of the State of Kentucky, the principal office of which Commission is fixed by law at Frankfort, the seat of government of said State, which is in the Eastern District of Kentucky whereof the defendants as constituting said Commission are all inhabitants.

## III.

Your complainant was incorporated and organized under an Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to Charter the Louisville and Nashville Railroad Company," approved March 5, 1850, whereby complainant was authorized to construct and operate a railroad from Louisville, Kentucky, to the State Line in the direction of Nashville, Tennessee. Thereafter said charter was amended by an Act of said General Assembly, approved March 20, 1851, and by its said charter, thus amended, complainant was authorized to construct and operate a branch of its railroad to the Mississippi River and any other branches it might desire. Again, its charter was amended by Act of said General Assembly, approved January 17, 1856, and by its charter, as thus amended, complainant was authorized to purchase and hold any railroad constructed by any other railroad company. This said charter was amended by divers other Acts of said General Assembly, and by virtue of said charter, as thus amended, and upon the faith thereof, complainant has constructed branches and acquired and now owns, holds and operates, among others, the following railroads within the State of Kentucky, namely: The Cincinnati Division, from Louisville to Newport, 113.83 miles in length, also extends from Newport to Cincinnati, O.;

3 The Kentucky Central Division, from Sinks to Covington, 149.88 miles long, also extends from Covington to Cincinnati, Ohio; The Richmond Branch, from a point near Richmond on the

Kentucky Central Division, to Rowland, a distance of 30.43 miles;

The Main Stem from Louisville to the Tennessee State Line, a distance of 139.88 miles;

The Bardstown and Springfield Branch, from Bardstown Junction on the Main Stem to Springfield, via Bardstown, a distance of 37.44 miles;

The Knoxville Branch, from Lebanon Junction, on the Main Stem, to the Tennessee State Line at Jellico, a distance of 171.17 miles;

The Lexington Branch, from La Grange, on the Cincinnati Division, to Lexington, a distance of 67.00 miles.

The destination-mentioned in this complaint and in the exhibit hereto attached are located on respective divisions of the Company, as follows:

On the Bardstown and Springfield Branch:

Bardstown,  
Chapeze,  
Clermont,  
Deatsville,  
Early Times,  
Greenbrier,  
Hobbs,  
Samuels;

On the Knoxville Branch:

Chicago,  
Coon Hollow,  
Gethsemane,  
Lebanon,  
Loretto,  
St. Mary's;

On the Richmond Branch:

Silver Creek;

On the Lexington Branch:

Eminence.

#### IV.

Complainant states that by section two hundred and nine (209) of the Constitution of the State of Kentucky, adopted September 28, 1891, the Railroad Commission of that State was established and provided for as follows:

"A commission is hereby established, to be known as 'The Railroad Commission' which shall be composed of three Commissioners. During the session of the General Assembly which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three Commissioners, one from each superior Court District as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall continue in office during the term of the present Governor, and until their successors are elected

and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may from time to time change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in any wise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. The General Assembly may, for cause, address any of said Commissioners out of office by similar proceedings as in the case of Judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor."

Complainant states that said Railroad Commission on or prior to September 28, 1891, the date the present Constitution of the State of Kentucky was adopted and went into effect, had not been empowered by any then existing constitutional or statutory provision to regulate or to fix the rate, toll or compensation, which a railroad company or corporation might charge, collect or receive for the service of transporting freight or passengers over its line or lines of railroad in that State, nor was there any attempt made by the General Assembly of the State of Kentucky afterward to confer such power upon said Commission until March 16, 1900, when said General Assembly attempted to grant such power to said Commission by enacting what is commonly called the "McChord Act," which, including its title, — as follows:

5 "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employés from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order and on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employé of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employé thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars;

"2. The Circuit Court of any County into or through which the line or lines of road carrying such passenger or freight, owned or

6 operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

"3. Prosecutions under this act shall be by indictment.

"4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

Approved March 10, 1900."

By this act the said General Assembly undertook to authorize said Railroad Commission when complaint shall be made to it, or when it receives information, or has reason to believe that any railroad company or corporation is charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in the State of Kentucky, to perform judicial functions, that is to say, to hear and determine the matter as speedily as possible, having first given ten days' notice to the company or corporation complained of by letter mailed to an officer or employé of said company or corporation, stating the time and place of the hearing, also the nature of the complaint or matter to be investigated; and the said General Assembly by the act aforesaid attempted to confer the judicial power upon said Commission to hear such statement, arguments or evidence offered by the parties as the Commission may deem relevant; and, should said Commission determine, in the exercise of the powers of a court sought to be thus granted to it, that the company or corporation is, or has been, guilty of extortion, the said General Assembly undertook to grant or delegate to said Commission legislative power, and to impose on it the duty to make and fix, without further notice or investigation, a just and reasonable rate, toll or compensation which such railroad company or corporation may charge, collect or receive for like services thereafter rendered. According to the provisions of said act the rate, toll or compensation so fixed by said Commission shall be entered and be an order on the record book of its office, and be in full force and effect at the expiration of ten days after said Commission shall have mailed a copy of the order fixing the same to any officer, agent or employé of the company or corporation affected thereby; and said act further provides that such order of said Commission may be at any time, without further notice, evidence or investigation, revoked or modified by an order of said Commission likewise entered of record.

It is further provided by said act that should such railroad com-

7 pany or corporation, of any officer, agent or employé thereof, charge, collect or receive a greater or higher rate; toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as aforesaid, said company or corporation, and said officer, agent or employé, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense in any sum not less than five hundred (\$500) dollars, nor more than one thousand (\$1000) dollars, and, upon a second conviction, in any sum not less than one thousand (-1000) dollars, nor more than two thousand (\$2000) dollars, and for a third and succeeding convictions, in any sum not less than two thousand (\$2000) dollars, nor more than five thousand (\$5000) dollars.

The said act further provides that the Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by such railroad company or corporation, and the Franklin Circuit Court, in said State, shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employé, shall have jurisdiction in all prosecutions against said officer, agent or employé.

## V.

By the provisions of Section 819, Kentucky Statutes, which is Section 226 of an act entitled, "An Act providing for the creation and regulation of private corporations," which became a law April 5, 1893, the offenses of extortion and unjust discrimination by a railroad company or corporation are required to be prosecuted by indictment or action in the name of the Commonwealth of Kentucky, upon information filed by the Railroad Commissions, and such indictments shall be made only upon the recommendation or request of the Railroad Commission filed in the court having jurisdiction of the offense. This section is in substance the same as section four (4) of the act of the General Assembly of the State of Kentucky, approved April 6, 1882, entitled, "An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations and in aid of that purpose to establish a board of Railroad Commissioners and define its powers and duties," set forth in the General Statutes of Kentucky, edition of 1888, page 1023. The said act of March 10, 1900, known as the McChord Act, does not appear to have been intended to change the settled legislative policy that indictments for such offenses should be found on the recommendation of the Railroad Commission, and the duty of enforcing any orders making and fixing a railroad rate under the provisions of the last mentioned act rests on the defendants constituting the said Railroad Commission.

## VI.

The Constitution of the State of Kentucky, which is now and has been since September 28, 1891, in full force and effect, contains these provisions:

8 "SEC. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

"SEC. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Said State Constitution also provides as follows:

"Sec. 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"SEC. 135. No courts, save those provided for in this Constitution, shall be established."

The said Railroad Commission is not a court established by said Constitution, nor is it by any provision thereof vested with any judicial or legislative powers or functions whatever concerning rates or otherwise, nor is the General Assembly thereby authorized to legislate upon, regulate or fix such rates for the transportation of freight or passengers, or to grant or delegate any judicial or legislative powers to said Commission to regulate or fix railroad rates for the transportation of freight or passengers within the State of Kentucky. But, notwithstanding said provisions of the present Constitution of the State of Kentucky, the General Assembly, in violation thereof, by said McChord Act of March 10, 1900, attempted to grant and delegate to and combine in said Railroad Commission all three of the fundamental powers of said State government or of a government republican in form, viz: Those which are legislative; those which are executive; and those which are judicial; so that said Commission is an anomalous and unconstitutional body, which, with respect to all proceedings or investigations before it concerning the rates charged, collected or received by railroad carriers of intrastate freight and passengers, occupies the attitude of complainant, judge, legislator and prosecutor. It may itself be the complainant, or may act as the complainant's attorney; as judge, it may try all preliminary questions and pass on the guilt or innocence of the carrier accused of extortion; as legislator, it may make and fix the compensation of the carrier found by it guilty of extortion for like services thereafter rendered; as informer, it may procure indictments by the Grand Jury for the disobedience of its legislative acts; and as prosecutor, it may recover in behalf of the State from the carrier thus indicted the penalties imposed by said act for such disobedience.

No appeal to any court or tribunal possessing judicial powers is allowed or provided for by said McChord act, or any other statute of the State of Kentucky, in behalf of the railroad carrier, from

9 any order of said Commission adjudging it guilty of extortion, or from any order of said Commission making and fixing what it shall have determined to be a just and reason-

able rate, toll or compensation, which such railroad carrier may charge, collect or receive for like services thereafter rendered in lieu of rate, toll or compensation held by said Commission to be extortionate. A judicial investigation or judicial review of the question of the reasonableness of the existing rate, toll or compensation being charged, collected or received by a railroad carrier, or of the accusation of extortion, is not allowed or provided for by said McChord Act or any statute of the State of Kentucky. The order or judgment of said Commission adjudging that an existing rate of any railroad carrier operating a line of road in the State of Kentucky for the transportation of intrastate freight or passengers is extortionate, or that such carrier is guilty of extortion, is final and conclusive, or intended so to be, by any fair or reasonable construction of said act; and in any prosecution by indictment in the Circuit Court, having criminal jurisdiction to recover the penalties imposed by said act for disregarding such order or judgment of said Commission, or for charging, collecting or receiving a higher or greater rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, neither the carrier, its officer, agent or employé, indicted for the alleged offense of extortion, is allowed by the terms of provisions of said McChord Act, or any statute of the State of Kentucky, to make or establish by evidence the defense that the existing rate charged, collected or received is just and reasonable, or that the rate made and fixed by said Commission is not just and reasonable.

Furthermore, were such a defense allowed the issue raised thereby could not be in the nature of the case tried by a jury or a court of criminal jurisdiction. Besides, different juries or courts, were such a defense permitted, might reach different conclusions on the same or similar testimony as to whether the offense of extortion had been committed; and the criminality of the act of the carrier or its officer, agent or employé indicted would depend on the view of the jury or court of the reasonableness of the rate charged, collected or received, and the question of reasonableness would depend on many uncertain and complicated elements.

Complainant states that the rate, toll or compensation made and fixed by said Commission as, in its opinion, just and reasonable one for certain services in the transportation of intrastate freight or passengers, to be thereafter followed or observed by the carrier, is by any fair or reasonable construction of said McChord Act, not simply advisory nor merely *prima facie* just and reasonable, but final and conclusive as to what is a just and reasonable rate, toll or compensation for the services of the carrier, as prescribed by said Commission, for like services thereafter rendered, and said act neither contemplates nor allows any issue to be made or inquiry to be had as to the justness or reasonableness in fact of any rate, toll or compensation made and fixed by said Commission, which, under the provisions of said act, is the only one that is lawful, and, in

10 contemplation of law, the only one that is just and reasonable, and in any proceeding under said act to enforce the final order or ruling of said Commission, in these respects, by

the recovery of the fines and penalties imposed thereby or otherwise, there is no fact left to be traversed or reviewed by the court or jury, except the fact of the alleged violation of said act in not complying with such final order or ruling of said Commission.

Complainant states that said McChord Act is violative of the sections of the State Constitution of Kentucky hereinabove referred to, and is, therefore, void.

Complainant further states that said McChord Act is not only unconstitutional and void as violative of the Constitution of the State of Kentucky, but it constitutes as abandonment by said State of a republican form of government in so far as it undertakes to vest legislative, executive and judicial powers of an absolute and arbitrary nature over the property of railroad carriers in one body or tribunal styled the Railroad Commission, and is thus violative of the letter and spirit of Section 4, Article IV, of the Constitution of the United States, and is, therefore, void.

The said act deprives the carrier interested or affected of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor as an absolute finality the action of said Railroad Commission, which, in view of the provisions of the Constitution of the State of Kentucky, is and can be at most only an administrative body or tribunal and is not and cannot be clothed with judicial powers or functions, and does not possess the machinery of a court of justice, and is, therefore, incapable of affording the judicial investigation to which complainant and other railroad carriers are entitled, and by the enforcement of the provisions of said act complainant is denied the privilege and right to have judicially determined by a court of competent jurisdiction whether or not the rates charged, collected or received by it for the transportation of intrastate freight and passengers on its lines of road in the State of Kentucky, are just and reasonable, and whether or not the rates made and fixed by said Commission for like services thereafter rendered are in fact just and reasonable, or a confiscation or spoliation of its property.

Furthermore, complainant states that said McChord Act, in so far as it attempts to clothe said Railroad Commission with legislative, executive and judicial powers of an arbitrary nature over the property of railroad carriers and the use thereof, is an act by the State of Kentucky, the enforcement of which operates to deprive such carriers of their property without due process of law, and to deny such carriers the equal protection of the laws, and said act is, therefore, unconstitutional and void, being in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant further states that said McChord Act has not been construed in any case by the Court of Appeals, the highest court of the State of Kentucky, nor has it been upheld in any case as valid or constitutional, measured by either the Constitution of the State of Kentucky or the Constitution of the United States, by any court of competent jurisdiction, either State or Federal.

## VIII.

Complainant further states that in its effort to prevent any judicial inquiry as to the validity of said McChord Act the General Assembly of the State of Kentucky burdened with excessive, extreme and cumulative fines and penalties any challenge thereof in the courts so that the carrier or party affected thereby is necessarily constrained to submit to an unjust and unreasonably low rate made and fixed by said Commission for its services in transporting intra-state freight or passengers, rather than take the chances of the fines and penalties imposed for a refusal or failure to comply with said Commission's final order making and fixing such rate, and thus such carriers are deprived by the State of Kentucky, through the operation of said act, of the equal protection of the laws in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Furthermore, the provisions of said McChord Act which have been hereinabove referred to, in prescribing a fine of not less than Five Hundred Dollars nor more than One Thousand Dollars for the first offense of extortion, as therein defined, and a fine of not less than One Thousand Dollars nor more than Two Thousand Dollars for the second offense, and a fine of not less than Two Thousand Dollars nor more than Five Thousand Dollars for the third offense in each case against a railroad company or corporation of any officer, agent or employe thereof, charging, collecting or receiving a greater or higher rate, toll or compensation or like services that may be rendered after the order of the Commission thereon than that made and fixed by said Commission, do impose upon such railroad company or corporation and upon such officer, agent or employé thereof, the burden of obtaining a judicial decision of the question of the reasonableness and justness of the rate or rates, toll or compensation so charged, collected or received, only upon the condition that if unsuccessful such railroad company or corporation or such officer, agent, or employé thereof, must pay fines as provided in said McChord Act, as hereinabove set forth, and thus the provisions of said McChord Act do close up all approaches to the courts and do thus prevent any hearing upon the question whether the rate or rates, charges or compensation, as provided in said Act and as made and fixed by said Commission, are not too low and, therefore, invalid, and complainant says that said fines and penalties imposed and made cumulative by said McChord Act are excessive within the meaning and intent and in violation of Section 17 of the State Constitution of Kentucky and they are unconstitutional on their face without regard to the question of the justness or reasonableness of the rates that may be made or fixed by said Commission, and are, therefore, in violation of the provisions of Article XIV of the Amendments to the Constitution of the United States, and said McChord Act is therefore unconstitutional and void.

## IX.

Complainant states that, while all other common carriers are subject only to the common law requirement that their rates shall be just and reasonable, and, in case of a controversy, are entitled to have the judgment of the courts upon the question of the reasonableness thereof, the State of Kentucky by said McChord Act singles out common carriers by railroad and denies them the equal protection of the laws granted by said State to all other common carriers, and deprives railroad carriers of any opportunity to have a judicial determination of the reasonableness of their rates, when the same are called in question or charged to be extortionate, and substitutes therefor the arbitrary determination of said Railroad Commission, a non-judicial body, which does not and cannot afford a judicial hearing or determination of such questions brought before it; and, whereas, all other common carriers, in the event of a judicial determination by a court of competent jurisdiction that their rates are unreasonable, are bound to refund only the excess of such rates over what are just and reasonable rates, and no other penalty or burden attaches to such judicial determination, a common carrier by railroad is, by the provisions of said act, subjected, in the absence of any judicial investigation or determination whatever as to whether its rate is reasonable, and simply upon the determination of said non-judicial body that such railroad carrier is or has been guilty of extortion, to the penalty of having the power to make and fix its rate taken out of its hands and vested exclusively in said Commission, which is then, according to the provisions of said act, required to make and fix what it may think is a just and reasonable rate, toll, or compensation to be charged, collected or received by such railroad carrier for like services thereafter rendered, and if such railroad carrier fails or refuses to comply with the rate made and fixed by said Commission it is subjected, for every shipment passing over its line of road to which said Commission may desire the rate made and fixed by it to apply, to the prosecutions, excessive fines and cumulative penalties imposed and prescribed by said act, and thus such railroad carrier is deprived of its property without due process of law, and denied the equal protection of the laws, in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States.

Complainant states that said McChord Act relates to and affects all freight and passenger rates charged, collected or received by railroad carriers in the State of Kentucky, and is not restricted to rates actually charged, collected or received within said State for the transportation of traffic, having its origin and destination in said State, and by its terms and provisions said act is an express and direct interference with and regulation of interstate commerce, and in conflict with sub-section three (3), section eight (8), of article one (1) of the Constitution of the United States, which vests in the Congress of the United States the exclusive power to regulate commerce among the several States, which power the Congress has exercised by An 13 Act to regulate commerce" approved February 4, 1887, and the amendments thereto, and said McChord Act is therefore, unconstitutional and void.

## XL.

Complainant further states that heretofore, to wit, on the 30th day of May, 1910, the Greenbrier Distillery Company and numerous other corporations acting in concert with said Distillery Company, each of which claimed and purported to be a corporation duly incorporated and empowered under the laws of the State of Kentucky to engage in the distillery business, that is to say, in the manufacture, storage, preparation for market, and sale of whiskey and other distillery products, and in shipping same to and from their respective plants filed their joint petition as plaintiffs with the Railroad Commission of Kentucky against this complainant, and therein said Greenbrier Distillery Company and its co-plaintiffs alleged that their respective plants were located upon the lines and at certain named stations of defendant in said complaint, the Louisville and Nashville Railroad Company, complainant herein, which are in a previous paragraph hereof specially set forth, and that, in order to carry on and to operate their respective distilleries, it was, in said petition, alleged to be necessary for each of said plaintiffs to cause to be transported over defendant's lines from various points in Kentucky set forth in Exhibit A filed with said petition to their respective plants various commodities alleged to be necessarily used by said plaintiffs in the manufacture and preparation of whiskey and other distillery products for the markets.

In said petition, said plaintiffs did set forth in Exhibit A made part thereof the rates therein complained of and the commodities upon which the same were then assessed, as well what purported to be former rates as the points of origin and of destination, and plaintiff did further therein allege that, for many years prior to the 25th day of March, 1910, defendant had transported over its line or lines of railroad to and from points wholly within the State of Kentucky the various commodities shown in said Exhibit and that it had charged, collected, and received from the plaintiffs during said time the rates printed therein from said points of origin to their said respective plants, and it was further therein alleged that on the 15th day of March, 1910, defendant issued its circular 2910 cancelling each and all of said printed rates shown in said Exhibit, and that in lieu thereof to be effective March 25th, 1910, defendant had substituted the designated new rates, which were shown by figures inserted in said Exhibit in red ink, and that for the transportation of all said commodities to and from the points shown in said Exhibit, this defendant had ever since the 25th day of March, 1910, charged, collected, and received from the plaintiffs the said increased rates as aforesaid, and still charges, collects, and receives from the plaintiffs the said increased rates as aforesaid.

It was further alleged by said plaintiffs, in said petition, that each and all of said increased rates so charged, collected, and received,

from said points of origin to the respective plants of each of 14 the plaintiffs, as shown in said Exhibit so far as the same are

therein shown to be in excess of said former rates, were ex-tortionate, unjust, and unreasonable, and it was alleged that defendant as aforesaid had induced plaintiffs and each of them to expend

large sums of money in the erection of and in additions to their several plants upon the faith, as it was in said petition alleged, of said former rates, and that the defendant had maintained said rates for many years as just and reasonable rates.

And it was further alleged in said petition that all said rates charged, collected, and received by Complainant prior to March 25, 1910, were fairly remunerative, and that they were and are no more than just and reasonable compensation for the transportation of said commodities to and from said points.

Plaintiffs did thereupon pray that the Railroad Commission of Kentucky would, after due notice and investigation, make and fix just and reasonable rates to and from all the points and upon all the commodities, as shown in their said Exhibit A, and that the said rates should be fixed no higher than those charged, collected, and received by defendant for the transportation of said commodities to and from said points prior to the cancellation of said former rates, which was effective March 25, 1910, and they prayed further for all necessary orders in the premises.

It was also in said petition set forth by said plaintiffs, in the second paragraph thereof, that inasmuch as defendant had continuously since the 25th day of March, 1910, charged, collected, and received from plaintiffs and was continuing so to charge, collect, and receive from them the increased rates shown in their said Exhibit A aforementioned, said defendant was, as said plaintiffs alleged, to the extent of the difference between said former rates and the existing rates then in effect, as set out in said first paragraph and in said Exhibit A, charging, collecting, and receiving from plaintiffs and each of them extortionate, unjust, and unreasonable rates for the transportation of commodities named in said Exhibit A and the several Exhibits thereafter to be filed by plaintiffs, but which, in fact, were never filed,—which Exhibits, it was therein stated, would show the amount of such alleged extortionate charges and collections made from each of the plaintiffs to the dates therein respectively stated, and plaintiffs did allege that the plaintiff, Greenbrier Distillery Company, was entitled to recover the sum of Five Hundred and Thirty-two and 62-100 Dollars, (\$532.62); the plaintiff T. W. Samuels Distillery Company the sum of One Hundred and Twenty-three and 48-100 Dollars, (\$123.48); the plaintiff Early Times Distillery Company, the sum of Four Hundred and Eight and 51-100 Dollars, (\$408.51); the plaintiff Mueller, Wathen & Kober, the sum of Four Hundred Dollars and 77-100, (\$400.77); the plaintiff Tom Moore Distillery Company, the sum of Forty-four and 51-100 Dollars, (\$44.51); the plaintiff W. B. Samuels & Company, the sum of Forty-eight and 81-100 Dollars, (48.81); the plaintiff M. C. Beam & Company, the sum of Fifty-seven and 15 42-100 Dollars, (\$57.42); the plaintiff Old Gran Dad Distilling Company, the sum of Two Hundred and Thirty-one and 58-100 Dollars, (\$231.58); plaintiff Head and Parker, the sum of Forty-four and 80-100 Dollars, (\$44.80); the plaintiff Wright & Taylor, the sum of Two Hundred and Fifty-seven and 50-100 Dollars, (\$257.50); the plaintiff Clear Springs Distilling Company, the sum of Four Hundred and Eighty-one and 89-100

Dollars, (\$481.89); the plaintiff S. Grabfelder & Company, the sum of Three Hundred and Twenty-five and 78-100 Dollars, (\$325.78); the plaintiff Taylor & Williams, the sum of Two Hundred and Thirty-seven and 19-100 Dollars, (\$237.19); the plaintiff Willow Springs Distilling Company, the sum of Three Hundred and Twenty-one and 62-100 Dollars, (\$321.62); and plaintiff Blair, Osborne & Ballard Distillery Company, the sum of Forty-two and 96-100 Dollars (\$42.96).

And plaintiffs thus prayed that reparation be awarded to each of them for the amounts stated to be severally due, and that an award be made to each of them by the Commission for said respective sums, and plaintiffs did pray for all other and necessary orders and proceedings to which they might be entitled in the premises.

And complainant, being defendant in said proceeding, did move to strike from the petition of plaintiffs all matters relating to reparation, on the ground that the Railroad Commission of Kentucky had no authority to grant same.

Thereafter, Complainant, without waiving any question of law or procedure, filed its Answer in said proceeding traversing every affirmative allegation and material averment of said petition, and prayed that the same should be dismissed.

Afterwards, the defendants set the matter for hearing and on the 24th day of June, A. D. 1910, plaintiffs in said proceeding introduced a number of witnesses, and defendant, (being this Complainant), introduced a number of witnesses, but although the witnesses introduced by the plaintiffs, Greenbrier Distillery Company, and others, did testify to the rates on grain and distillery supplies on the lines of railroad of Complainant to points of destination thereon, to-wit, the distilleries of plaintiffs, respectively, and did further testify to the rates charged, collected, and received by Complainant for the transportation of said commodities to such points of destination both prior to March 25, 1910, and subsequent to said date, and, furthermore, though some of said witnesses did testify that they did, at the time of making considerable betterments and improvements on or about their respective distillery plants at such several points of destination, all within the State of Kentucky, suppose that the rates of this Complainant for the transportation of such commodities from the City of Louisville, Kentucky, to such points of destination within the State of Kentucky, would continue in force and effect, there was no testimony by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that became effective on the lines of railroad of Complainant on March 25, 1910, and that have been charged,

collected, and received by it for such service of transportation  
16 on the commodities named on and subsequent to said date, and no evidence was adduced in said proceedings that established or that tended to establish the unjust or unreasonable nature of said rates or of any of them or that said rates or any of them were or are extortionate; and no evidence was adduced that showed or tended to show that defendant, Louisville and Nashville Railroad Company, had induced any of the plaintiffs to expend large or any

sums of money in the erection of or in additions to their several plants upon the faith of said former rates or of any of them.

But the evidence did show, and it is a fact, that on and for a number of years prior to the 25th day of March, A. D., 1910, this Complainant did have in effect upon its lines of railroad from the points of origin aforesaid to said points of destination rates of transportation covering supplies for distilleries that were established and effective alone for the benefit of owners of distilleries located at said last-named points and with a purpose to encourage the manufacture of whiskey at said points on the lines of railroad of Complainant, and it was shown by the evidence at said hearing, and it is a fact, that said rates, (all of which were contained in the tariffs of Complainant), did not apply to shipments of said supplies from the same points of origin to the same points of destination when said supplies were intended for other uses than those of the distilleries, but, on the contrary, in such cases, the rates that were contained in its tariffs and were, in fact, charged, collected, and received as aforesaid for like supplies when intended for distillery use. And a comparative statement of the rates applicable when the supplies were not to be used at distilleries is written in red ink upon the tabular statement, of which all else is in black ink, filed as part hereof marked Exhibit D.

That at all such times, said rates, applicable when the supplies were not for the use of distilleries, were the same rates which, under the tariff effective March 25, 1910, were made applicable also to said supplies when for such use; in other words, the difference in the rates based upon the intended uses of the supplies was abolished, but the rates made effective March 25, 1910, as aforesaid, were and are reasonable and just.

Nevertheless, the defendants, the Railroad Commission of Kentucky, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, did, on August 10, 1910, pass an order to the effect that the rates then charged, collected, and received by defendant, (being Complainant herein), for the transportation of the commodities to and from the points thereafter, (and herein below), named were extortionate, unjust and unreasonable, and that by charging said rates said defendant, (being Complainant herein), was and had been guilty of extortion, and said defendant Louisville and Nashville Railroad Company, (being Complainant herein), was then and there by said written Order forbidden to charge, collect, or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:

*Explanation of Abbreviations.**Rates in Cents per Hundred Pounds unless Otherwise Specified.*

To—	From—	Bbl., box material, Bbls., empty; Bbls., caps, K. D.; min. wt., 120 lbs., per 30,000 lbs., per barrel.	Bots., covs., paper or straw, Bots., empty, metal, packed or pressed in holes; min. wt., 15,000 lbs., per quantity.	Bots., com., packed or released; min. wt., 24,000 lbs., per 24,000 lbs.	Boxed, empty, any quantity.	Corn, rye, malt, or barley; min. wt., 24,000 lbs., per 24,000 lbs.
C. L.	L. C. L.	C. L.	C. L.	C. L.	C. L.	C. L.
Bardstown, Ky., Covington (prop.), Ky.	11	23	14	43	23	29
Newport (prop.)					25	31 $\frac{1}{2}$
Louisville, Ky.,.....	6	15	9	23	15	17
Louisville, Ky.,.....	5	13	9	20	13	15
Louisville, Ky.,.....	7	15	10	26	15	23
Louisville, Ky.,.....	5	13	9	20	13	17
Covington, Ky.,.....	12	20 $\frac{1}{2}$	14	37 $\frac{1}{2}$	15	14
Newport, Ky.					33	28 $\frac{1}{2}$
Louisville, Ky.,.....	7	15	10	26	15	23
Louisville, Ky.,.....	6	15	9	23	15	17
Louisville, Ky.,.....	6	15	9	23	15	17
Louisville, Ky.,.....	6	15	10	26	15	20
Louisville, Ky.,.....	5	13	9	23	15	17
Louisville, Ky.,.....	7	15	10	26	15	20
Greenbrier, Hobbs,					17	15
Lebanon,					15	14
Loretto,					20	17
St. Mary's,					17	15
Samuels,					20	15
Silver Creek,					17	15
Covington, Ky.,.....	6	15	9	23	15	17
Newport, Ky.,.....	10	19	12	25	19	25
Louisville, Ky.,.....	10	19	12	35	19	31
Eminence, Ky., Louisville, Ky.,.....	6	15	10	25	19	25

18 And said Railroad Commission did thereupon declare that the foregoing rates so by it fixed for the transportation of said commodities from and to said points were just and reasonable.

And Complainant states that, without having heard any evidence whatsoever relative to the amount of money claimed by any of the plaintiffs in this proceeding as a refund on account of payment by them respectively to Complainant between March 25, 1910, and August 10, 1910, for the transportation of said commodities or some of them, between the points of origin and the points of destination, all within the State of Kentucky, the Railroad Commission did nevertheless on said 10th day of August, 1910, pass another written Order whereby and wherein it again expressed the opinion and did order that the rates that were then charged, collected, and received by defendant, (being Complainant herein), for the transportation of said commodities to and from the points fully set out in the written Order of said Commission aforementioned, were and are extortionate, unjust, and unreasonable, and it did order that this defendant, by charging said extortionate rates, was and had been guilty of extortion, and the Commission did then find it to be a fact, without any evidence whatsoever having been presented before it in support thereof, that the Complainants, who are hereinbelow named, had paid to defendant, (being Complainant herein), the following sums in excess of just and reasonable rates for the transportation of said commodities to and from said points respectively, and that each of said Complainants hereinafter named was by said order awarded sums respectively set opposite their names, to wit:

Greenbrier Distillery Co.	532.62
Clear Springs Distilling Co.	481.89
Early Times Distilling Co.	408.51
Mueller, Wathen & Kober.	400.77
S. Grahfelder & Co.	325.78
Willow Springs Distilling Co.	321.62
Wright & Taylor.	321.62
Taylor & Williams.	237.19
Eminence Distillery Co.	248.37
Old Gran Dad Distillery Co.	231.38
T. W. Samuels Distillery.	123.42
Warwick Distilling Co.	127.74
Burks Spring Distillery Co.	145.25
W. B. Samuels & Co.	58.81
M. C. Beam & Co.	57.42
Head & Parker.	44.80
Blair, Osborne & Ballard Distilling Co.	42.86
Tom Moore Distillery.	44.51
Brown-Forman Company	
Bernheim Distilling Co.	
Mattingly & Moore Distillery Co.	
F. G. Walker Co.	
Charles Kober & Co.	
Smith Distillery Co.	
R. Cummins & Co.	

19 And the Commission did furthermore order that each of said named complainants was entitled to recover of defendant, (being Complainant herein), the sum hereinabove respectively set opposite its name, and it was further ordered by the Commission that upon failure of defendant, (being Complainant herein), to pay to each of said complainants the sum set opposite its name respectively as hereinabove set forth, a certified copy of its said Order, finding and award, together with the evidence heard, should be filed by A. T. Siler, Chairman of said Commission, defendant herein, in the Office of the Clerk of the Circuit Court of the County having jurisdiction as provided by law, to the end that the said complainants may recover of said defendant their said respective sums.

There was no evidence introduced in said investigation or considered by said Commission showing or tending to show that this Complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky or between the points of origin and of destination aforementioned were in and of themselves unjust, unreasonable, or extortionate, nor was there any evidence introduced in said investigation when considered by said Commission showing or tending to show what sum of money, if any, the complainants in said proceeding or any of them were entitled to receive as reparation from this Complainant on account of previous payment by them or any of them of alleged unjust or unreasonable or extortionate rates.

Complainant says that the aforementioned two written opinions and orders passed by the Commission as above stated on August 10, 1910, were ordered by said Commission to be recorded upon the record books of said Commission and a certified copy of each of them was ordered to be furnished to defendant, Complainant herein. And the several rates made and fixed by the Commission as hereinabove set forth were entered as and were to be an order on the record book in the Office of said Commission and signed by the Commission, and a copy thereof was mailed by said Commission to W. G. Dearing, who is General Attorney of Complainant, and was received by said Dearing at Louisville, Kentucky, on August 31st, 1910. The original copy of said written opinion and orders mailed Complainant's General Attorney as aforesaid is filed herewith as part hereof marked Exhibit No. B. Complainant also files as part hereof, copy of petition and exhibits filed by plaintiff's Greenbrier Distillery Company, and others, and copy of Answer of defendant Louisville and Nashville Railroad Company,—all filed in said proceeding before the Commission, and marked Exhibit No. C.

Complainant further shows that said written orders of the Commission, dated August 10, 1910, which purport to make and fix rates that may be charged, collected, and received by Complainant for the transportation of the commodities herein named between the points of origin and destination,—all within the State of Kentucky,—that are in said written Order set forth, are null and void, for the additional reason that said Orders do, by their terms, purport to

20 make and to fix rates that may be charged, collected, and received by Complainant for the transportation of the commodities named between the points mentioned, without reference to the uses or purposes to which said commodities were to be applied by the consignees at the points of destination, and that such written Orders do, by their terms, make and fix flat rates applicable to the commodities named wholly without regard to the uses or purposes to which such commodities were to be applied by the consignees thereof, whereas, in fact and in law, the only subject-matter that was brought before the Commission for investigation by the Greenbrier Distilling Company and others in the proceeding aforementioned was the making and fixing of rates for the transportation of the commodities named in said petition to be used by the consignees, being plaintiffs in said proceeding, in their several distilleries at or near the respective points of destination in the production of whiskey and for no other use or purpose whatsoever. This Complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said Orders thereon were and are null and void.

## XII.

Complainant states that the reduction in its said rates ordered by the Commission, if put into effect, will directly and necessarily interfere with, affect and reduce Complainant's existing rates on said commodities shipped to and from stations on its lines in Kentucky to and from stations on its lines outside of Kentucky, as the full amount of Complainant's said existing local rates in Kentucky enter into and form a part of its through rates set forth in its tariff filed with the Interstate Commission on or about March 25, 1910, and remaining on file with that Commission ever since as required by law, on such interstate shipments of freight belonging to the same classes. The said Order made by the Commission, were it to become effective, would not only reduce Complainant's said local rates in Kentucky and cause an annual loss to Complainant on intra-state freight of at least \$15,600, but would directly and necessarily result in reducing Complainant's through rates on interstate shipments of such freight, and cause an annual loss to Complainant thereon of not less than \$3000. Thus the total reduction in the

21 revenues of Complainant directly resulting from the Order aforesaid, should the same be put into effect, would not be less than \$18,600 per annum. Complainant states that the change in rates and charges directed by the Commission in its Order aforesaid, would necessarily result in the disturbance, alteration and reduction of interstate rates now and for a long time established on Complainant's lines, and to put into effect said Orders would be, to that extent, a direct regulation of interstate commerce and in violation of Clause Three (3), Section Eight, (8), Article One, (1) of the Constitution of the United States, which vests in the Congress of the United States alone the power to regulate interstate commerce, and this power has been exercised in the Act to amend the "Act to Regulate Commerce," approved June 29, 1906, and the Act to amend the Act to Regulate Commerce, approved June 18, 1910, wherein the power to fix and regulate rates to be charged, collected, or received by railroad carriers on interstate freight was delegated to the Interstate Commerce Commission, and since the approval of said Acts of Congress neither the State of Kentucky nor the Kentucky Railroad Commission has any power of authority to regulate or fix rates to be charged, collected, or received by railroad carriers so as to directly or indirectly regulate, disturb, interfere with or fix the rates of such carriers on interstate freight or traffic, or to impose any orders, rules, charges, or regulations, the necessary result of the enforcement of which would be to affect and regulate commerce between the State of Kentucky and other States, or conflict with the exercise of the powers delegated by the Congress to the Interstate Commerce Commission in the Act aforesaid. Complainant states that the Orders of the Commission promulgated, as it was, since the passage and approval of said Act of Congress on June 29, 1906, and the Act to Amend the Act to Regulate Commerce, approved June 18, 1910, is in conflict therewith and violates the commerce clause of the Constitution of the United States, the benefit and protection of which Complainant relies on and invokes in the premises.

### XIII.

Complainant states that its existing rates and charges in effect on its several lines in the State of Kentucky and applicable to its intra-state freight business, affecting the commodities named in said order between the points of origin and points of destination herein mentioned, instead of being extortionate, are not higher than is just and reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic, or with respect to the value of the services rendered to the shippers or public generally; and complainant states it has the lawful right, as inherent to its business as a common carrier of freight and passengers, to charge and receive for the services rendered by it in the State of Kentucky just and reasonable rates, which right to charge and receive such just and reasonable rates is a property right that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with; and complainant

states that the Commission's orders if permitted to be put in force,  
will deprive it of its said property right without due process  
22 of law in violation of section one (1) of the Fourteenth  
Amendment to the Constitution of the United States.

#### XIV.

Complainant further states that in the transportation of the commodities herein above set forth between the points of origin and the points of destination named, all being within the State of Kentucky, the Complainant would, if the aforementioned Orders of the Commission should be put into force and effect, be restricted to charging, collecting, and receiving no higher rates for such services than those which the Commission has prescribed in its said Orders and although the same are unreasonably low, and unjust, the Complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates.

And in the great number of prosecutions by indictment that may, and will, be found and prosecuted against complainant, its officers, agents, and employees, to recover the excessive fines and penalties imposed by the McChord Act, the schedule of rates made and fixed by the Commission must and will be taken by the Courts having criminal jurisdiction of the public offenses to be final and conclusive that the rates prescribed therein are just and reasonable, and that any higher rates charged or collected by complainant are unjust, unreasonable and extortionate, and therefore in violation of law or of the provisions of the McChord Act.

Complainant states that the question as to what is a just, reasonable, and non-confiscatory rate to be charged or collected for the transportation of freight or other traffic is an exceedingly difficult and complicated one, for the consideration of which a jury is wholly unsuited, and it is a question which requires for its determination an inquiry into numerous and technical facts to prove the existence of which necessitates the introduction of many witnesses, including the railroad officials, agents, and employees, who are engaged with duties of great importance to the public, the proper discharge of which requires the most constant attention of such officials, agents, and employés, in the offices where their books, records, and papers are kept.

Complainant states that if in the operation of its lines within the State of Kentucky, upon which said points of origin and of destination are located, Complainant fails or refuses to accept or to put into force and effect the schedule of reduced rates as prescribed in the Orders of the Commission aforesaid, defendants will cause to be instituted a great number of prosecutions by indictment against Complainant, its officers, agents, and employés, through the Grand Jury and Commonwealth's Attorney of each of the several Counties into or through which the line or lines of road carrying the freight are owned or operated by complainant, as well as in the County of Franklin, to recover the excessive fines and penalties imposed by the McChord Act for violations thereof, and Complainant will be sub-

jected to great expense in loss of time of its officers, agents, and employés in giving the necessary attention for the defense of such prosecutions.

Complainant further says that the defendants had no authority or power under the laws of the State of Kentucky to award reparation to the Greenbrier Distillery Company in the sum of Five Hundred and Thirty-two and sixty-two one-hundredths Dollars, (\$532.62), or in any other sum, for alleged excess of freight paid over and above what the Commission has fixed as a just and reasonable rate for the service rendered, or to award to any of the other plaintiffs in the proceeding before said Commission hereinabove described the sum of money awarded to it by said Order of August 10, 1910. Nevertheless, as hereinabove shown, upon the failure of this Complainant to pay to each of said corporations, plaintiffs in said proceeding, the sum hereinabove and in said Order set opposite their respective names, the defendant, Adam T. Siler, as Chairman of said Commission, will, pursuant to its said Order, file a certified copy of said Order, Finding, and Award in the Office of the Clerk of the Circuit Court of the County into or through which the line or lines of road carrying the freight for the transportation of which said award was made, extend, said roads being owned or operated by this Complainant, and said copy of Order, Finding and Award will be so filed by said defendant to the end that the plaintiff or plaintiffs in said proceeding, to whom such awards have been made by the Railroad Commission of Kentucky, may recover of this Complainant their respective sums, and Complainant states that a separate action will thus be brought against this Complainant by each of the said plaintiffs in the said proceeding for the recovery of their respective sums.

And Complainant states that in the multiplicity of such legal proceedings, which it seeks to avoid, the same questions would be involved without any opportunity for Complainant or its officers, agents, or employés, as the case may be, to make a defense or to show by evidence the reasonableness or justness of its said existing rates or the unreasonableness and unjustness of the rates aforesaid fixed by said Commission and the merits of any defense justifying a failure or refusal to obey said Order or Orders of the Commission cannot be tried in a court of law or in a court of criminal jurisdiction or be fully and finally settled otherwise than in a court of equity, and Complainant has no adequate remedy at law.

Complainant states that the defendants are threatening to carry out their said orders reducing the rates aforementioned by recommending and procuring numerous indictments against Complainant, its officers, agents, and employés on and after September 9, 1910, to recover the fines and penalties prescribed by the McChord Act, and the defendant Adam T. Siler, as Chairman of said Commission, threatens to file a copy of said Order of reparation, finding, and

award in the Office of the Clerk of the Circuit Court of each of the Counties above mentioned, to the end that the plaintiffs in said proceeding before the Commission may recover of this Complainant the respective sums set opposite their names in said Order 24 and Award, and the defendants will carry out their several purposes unless immediately restrained and enjoined by this Court from doing so.

Complainant states that it is not bound by, nor does it intend to obey, the several Orders of the Commission, either fixing the rates aforesaid or awarding reparation, and it does not intend to put into force and effect the rates so made and fixed by the Commission, and that it will neither put into force and effect said rates nor will it pay to each or any of the complainants or plaintiffs in said proceeding the sum set opposite their respective names in said Order of Reparation, unless denied relief from said respective Orders by the Court having final jurisdiction of this cause.

## XVII.

Complainant further states that this is a suit in equity of a civil nature; that the matter in dispute far exceeds exclusive of interest and costs, the sum or value of Two Thousand Dollars, (\$2000.00); that this cause is a suit arising under the Constitution of the United States, to wit, Section 4 of Article IV and Section I of Article XIV of the Amendment to said Constitution and other provisions thereof as hereinabove set forth.

In consideration whereof and for as much as Complainant is remediless in the premises at law or under the rules of the common law and can have adequate relief only in a court of equity where matters of this nature are properly cognizable and relievable, to the end that the defendant hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if same were again herein repeated and they were thereunto interrogated, Complainant prays that an injunction may issue out of this Court restraining and enjoining the defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton and each of them individually and jointly as constituting the Railroad Commission of the State of Kentucky, from continuing said Orders of August 10, 1910, mailed to and received by Complainant's General Attorney on August 31, 1910, or at any time thereafter; also restraining and enjoining said defendants and each of them individually and jointly as constituting the Railroad Commission of the State of Kentucky from recommending or causing to be instituted any prosecution by indictment or otherwise against Complainant or any of its officers, agents, or employés to recover any fine or penalty imposed by the McChord Act for or on account of Complainant's failure or refusal to put into force or effect on any of its lines of railroad in the State of Kentucky under protest or otherwise said Commission's Order promulgated August 31, 1910, or the rates fixed in the schedule prepared thereafter; also restraining and enjoining said defendant, Adam T. Siler, as Chairman of said Commission, from filing a certified copy of the Order, Finding and Award of Rep-

aration, together with the evidence heard, in the Office of the Clerk of the Circuit Court of any of the Counties having jurisdiction or into or through which the line or lines of road owned or operated by this Complainant carrying the freight, concerning which 25 said Award was made, or in the Office of the Clerk of the Circuit Court of any other County within the State of Kentucky.

And that in the meantime and until a decision can be had upon Complainant's Motion for the Injunction herein prayed for, a Restraining Order be granted immediately restraining the acts sought herein to be enjoined, Complainant hereby averring that there is danger of irreparable injury from delay if action should not be taken until said Motion for an Injunction be heard and determined; that a writ of injunction be issued commanding and enjoining plaintiffs, as above prayed for, and on final hearing that said injunction, as herein prayed for, be made perpetual; that said two Orders of August 10, 1910, promulgated August 31, 1910, and the schedule of rates made and fixed by the Commission and the Finding and Award of Reparation contained in the second of said Orders, be forewith declared null and void by decree of this Court, and that a mandatory injunction be issued commanding said defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarleton, constituting said Commission, to recall and revoke and abolish said Orders and Award, and each of them, and that the said McChord Act under which defendants claim power and authority to make said orders, be declared and adjudged by decree of this Court to be in violation of the Constitution of the United States and of the Constitution of the State of Kentucky, and therefore invalid, null, and void; and that Complainant may have such other relief as in equity it may appear to be entitled to.

And your Complainant prays that there be granted unto it the temporary Order aforesaid, the writ of injunction aforesaid, and a writ of subpoena of the United States of America, issuing out of and under the seal of this Honorable Court directed to said defendants, Adam T. Siler, Lawrence B. Finn, and Lew P. Tarleton, individually and as Railroad Commissioners of the State of Kentucky, commanding them, under a penalty to be therein fixed, to appear on some certain day to be therein named, before this Honorable Court and then and there to answer but not under oath, (said oath being hereby expressly waived), all and singular the premises and to stand to and to perform and abide by such order, direction, and decrees as may be made against them in the premises, and as shall seem to Your Honors to be meet and agreeable to equity and good conscience, and your Complainant will every pray.

This is the first and only application for a restraining order or injunction in this cause.

LOUISVILLE AND NASHVILLE RAIL-  
ROAD COMPANY,  
By ALBERT S. BRANDERS,  
WILLIAM G. DEARING,  
HENRY L. STONE,

*Counsel.*

## EXHIBIT "I"

Explanation of *Abt*

C. L.—Carload. L. C. L.—Less than carload. K. D.—Knocked

## Net Rates in Cents per Hundred Lbs.

To—	From—	Bbl. & box mt., K. D.				Barrels, empty; C. L. Min. 120 bbls., per bbl.				Bottle caps, metal, and quantity.			
		C. L. min. wt. 30,000 lbs.	L. C. L.	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	Old. New. Old. New. [\$]	
Bardstown, Ky.	(Covington (proper) Ky.),	11 *11	23	28	14	28	43	43					
	(Newport (proper) Ky.)												
"	Louisville (proper) Ky....	6	6	15	15	9	15	23	23				
Chapeze, Ky.	Louisville (proper) Ky....	5	5	13	13	9	13	20	20				
Chicago, Ky.	Louisville (proper) Ky....	7	7	15	22	10	22	26	26				
Clermont, Ky.	Louisville, Ky. (proper)...	6	5	15	13	9	13	23	23				
Coon Hollow, Ky.	(Covington (proper) Ky.),	12	12	20.5	34	14	34	37.5	36				
	(Newport (proper) Ky.)												
"	Louisville (proper) Ky....	7	7	15	22	10	22	26	26				
Deatsville, Ky.	Louisville, (proper), Ky....	6	6	15	15	9	15	23	23				
Early Times, Ky.	Louisville, (proper) Ky....	6	7	15	21	9	21	23	23				
Gethsemane, Ky.	Louisville, (proper) Ky....	6	7	15	21	10	21	26	26				
Greenbrier, Ky.	Louisville, (proper) Ky....	6	7	15	21	9	21	23	23				
Hobbs, Ky.	Louisville, (proper) Ky....	6	5	15	13	9	13	23	23				
Hunters, Ky.	Louisville (proper) Ky....	6	5	15	13	9	13	23	23				
Lebanon, Ky.	Louisville (proper) Ky....	7	8	15	26	10	26	26	26				
Loretto, Ky.	Louisville (proper) Ky....	7	7	15	23	10	23	26	26				
St. Marys, Ky.	Louisville (proper) Ky....	7	8	15	24	10	24	26	26				
Samuels, Ky.	Louisville (proper) Ky....	6	6	15	15	9	15	23	23				
Silver Creek, Ky.	(Covington (proper) Ky.),	10	10	19	19	12	19	35	35				
	(Newport (proper) Ky.)												
"	Louisville (proper) Ky....	10	10	19	19	12	19	35	35				

## NOTE:

\* New minimum 10,000 lbs. per 100 lbs.

† " " 24,000 "

‡ New boxes, wooden, empty, C. L. minimum 15,000 lbs.

[§ Column marked thus written in red ink in copy.]

EXHIBIT "A."

*Explanation of Abbreviations.*

L. C. L.—Less than carload. K. D.—Knocked down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight.

*Net Rates in Cents per Hundred Lbs. unless Otherwise Specified.*

Bbl. & box mt., K. D.	Barrels,		Bottle caps,		Bottle covers, paper or straw, packed or pressed in bales.		Bottles, common, packed, released.		Boxes,		Com., Rye, malt, barley; C. L., min. wt. 24,000 lbs.		Iron, hoop.								
	C. L., min. wt. 30,000 lbs.	empty; C. L. 120 bbls., per bbl.	Old. New.	Old. New.	Old. New.	Old. New.	C. L., min. wt. 15,000 lbs.	Old. New.	Old. New.	Old. New.	Old. New.	Old. New.	Old. New.	Old. New.	C. L., min. wt. 24,000 pounds.						
nd (Ky.) 11 *11	23	28	14	28	43	43	23	*28	29	32	25	30	31.5	37	28	*28	10	16	....	..	
w (Ky.) 6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
e 5	5	13	13	9	13	20	20	13	13	17	15	10	14	15	17	13	13	5	8	8	13
t 7	7	15	22	10	22	26	32	15	22	23	28	17	24	20	28	15	22	6	10	12.5	21
d 6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
lect (Ky.) 12	12	20.5	34	14	34	37.5	50	20.5	34	33	38	23.5	36	28.5	44	21.5	34	11	18	17	29
nit 7	7	15	22	10	22	26	32	15	22	23	26	17	24	20	28	15	22	6	10	12.5	21
the 6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
su 6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
y 6	7	15	21	10	21	26	30	15	21	20	23	17	22	20	27	15	21	6	10	12.5	21
ray 6	7	15	21	9	21	23	30	15	21	20	23	16	22	17	27	15	21	5	10	....	..
the 6	5	15	13	9	13	23	20	15	13	20	15	16	14	17	17	15	13	5	8	....	..
ed S 7	8	15	26	10	26	26	39	15	26	23	31	17	25	20	34	15	26	6	11	12.5	21
rabl 7	7	15	23	10	23	26	34	15	23	23	26	17	25	20	30	15	23	6	11	12.5	21
R 6	6	15	15	9	15	23	23	15	15	20	17	16	16	17	20	15	15	5	8	....	..
issi 10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..
half 10	10	19	19	12	19	35	35	19	19	31	25	21	21	25	31	19	19	10	13	....	..

minimum 15,000 lbs.  
and ink in copy.]

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26 STATE OF KENTUCKY,  
*Jefferson County:*

Personally appeared before me, H. C. McLellen, a Notary Public, duly commissioned, qualified and acting in and for the County and State aforesaid, Addison R. Smith, who, being duly sworn by me, deposes and says:

That he is the Third Vice President of the Louisville and Nashville Railroad Company, the Complainant in the foregoing Bill and knows the contents thereof; that the facts therein stated as of Complainant's own knowledge are true; and the facts therein stated as upon Complainant's information and belief, he believes to be true.

ADDISON R. SMITH.

Subscribed and sworn to before me this 7th day of Sept. A. D., 1910.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 26th day of February, A. D., 1912.

[SEAL.]

H. C. McLELLEN,  
*Notary Public, Jefferson County, Ky.*

Filed Sept. 7, 1910, Chas. N. Wiard, Clerk.

Exhibit "A", referred to and filed with the foregoing Bill of Complaint on September 7, A. D., 1910, is in words and figures as follows, to-wit:

(Here follows Exhibit "A", marked page 27.)

28      Exhibit "B", referred to and filed with the foregoing Bill of Complaint on September 7, A. D., 1910, is in words and figures as follows, to wit:

**"EXHIBIT B."**

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,  
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

*Order.*

The complainants herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communication from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said Complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House in the City of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Lawrence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission and by agreement of parties the 28th day of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties and on said day and date pursuant to said agreement the Commission met at the Galt House in said city, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

The Commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected and recovered by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable, and by charging said rates defendant is, and has been, guilty of extortion.

It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is, hereby forbidden to charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:

## Rates in Cents per One Hundred Pounds unless Otherwise Specified.

To—	From—	Bbl., box, mattock, first, K. D., minimum wt., 30,000 lbs.	Bbls., empty, min. 120 lbs., per bbl.	Bottle- cans, metal, avg. quantity	Bots, cans, paper or straw, packed or pressed in bales; min. wt., 30,000 lbs.	Bots, com- packed or released; minimum wt., 24,000 lbs.	Bots, com- empty, any quantity	Corn, rye, maize, or barley; min. wt., 24,000 lbs.
		C. L.	C. L.	C. L.	C. L.	C. L.	C. L.	C. L.
Bardstown, Ky.	Covington, Ky.—proper.	11	23	14	43	23	25	31.5
	Newport, Ky.—proper.	11	23	14	43	23	25	31.5
Chapeze	Louisville, Ky. ....	6	15	9	23	15	17	15
Chicago	Louisville, Ky. ....	5	13	9	20	13	15	15
Clermont	Louisville, Ky. ....	7	15	10	26	13	15	15
Coon Hollow	Covington, Ky. ....	5	13	9	29	13	17	15
Deatsville	Newport, Ky. ....	12	20.5	14	37.5	20.5	33	23.5
Early Times	Louisville, Ky. ....	7	15	10	26	15	23	23.5
Gethsemane, Ky.	Louisville, Ky. ....	6	15	9	23	15	17	15
Greenbrier	Louisville, Ky. ....	6	15	10	29	15	17	15
Hobbs	Louisville, Ky. ....	5	15	9	23	15	20	15
Lebanon	Louisville, Ky. ....	5	13	9	23	15	14	17
Loretto	Louisville, Ky. ....	7	15	10	26	15	23	17
St. Marys	Louisville, Ky. ....	7	15	10	26	15	23	17
Samuels	Louisville, Ky. ....	6	15	9	23	15	20	15
Silver Creek	Covington, Ky. ....	10	19	12	35	19	25	19
Newport, Ky.	Louisville, Ky. ....	10	19	12	35	19	21	19
Eminence, Ky.	Louisville, Ky. ....	6	15	10	25	17	19	18

## Explanation of Abbreviations.

C. L.—Carload. L. C. L.—Less Carload. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Bots.—Bottles. Bbl.—Barrel.

30      The Commission is of the opinion that the foregoing rates so fixed for the transportation of said commodities from and to said points are just and reasonable.

It is further ordered that this order be entered upon the records of this office, and a copy thereof attested by the Secretary of the Commission be furnished defendant.

This August 10, 1910.

A. T. SILER, *Chairman.*

L. P. TARLTON, *Commissioner.*

L. B. FINN, *Commissioner.*

Attest:

D. B. CORNETT, *Secretary.*

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

*Order.*

The complainants herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communication from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House, in the City of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Lawrence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission and by agreement of parties the 28th day of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties, and on said day and date, pursuant to said agreement, the Commission met at the Galt House in said City, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

The Commission now being fully advised, is of the opinion, and so orders, that the rates now charged, collected and received by defendant for the transportation of the commodities to and from the points fully set out in an order this day entered fixing just and reasonable rates in the above styled complaint, and as stated in said order are extortionate, unjust and unreasonable, and that by charging said extortionate rates said defendant is and has been guilty of extortion.

It further appearing to the Commission that the said rates upon

31 said commodities have been charged, collected and received by defendant since the 25th day of March, 1910, and it appearing that the complainants hereinafter named have paid to defendant the following sums in excess of just and reasonable rates for the transportation of said commodities to and from said points, this day fixed by the Commission as just and reasonable rates and as set out in said complaint, each of said complainants are awarded the following sums, to wit:

Greenbrier Distillery Company.....	\$532.62
Clear Springs Distilling Company.....	481.89
Early Times Distillery Company.....	408.51
Mueller, Wathen & Kobert.....	400.77
S. Grabfelder & Company.....	325.78
Willow Springs Distilling Company.....	321.62
Wright & Taylor.....	257.50
Taylor & Williams.....	237.19
Eminence Distillery Co.....	248.37
Old Gran Dad Distillery Company.....	231.38
T. W. Samuels Distillery.....	123.42
Warwick Distillery Company.....	127.74
Burks Spring Distillery Company.....	145.25
W. B. Samuels & Co.....	58.81
M. C. Beam & Co.....	57.42
Head & Parker.....	44.80
Blair, Osborne & Ballard Distilling Co.....	42.96
Tom Moore Distillery.....	44.51
Brown-Forman Company.....	
Bernheim Distilling Company.....	
Mattingly & Moore Distillery Co.....	
F. G. Walker Company.....	
Charles Kobert & Company.....	
Smith Distillery Company.....	
R. Cummins & Company.....	

It is, therefore, ordered that each of said complainants are entitled to recover of defendant the sums hereinabove respectively indicated.

It is further ordered that upon the failure of defendant to pay each of said complainants the sum set opposite their respective names as hereinabove stated, that a certified copy of this order, finding and award, together with the evidence heard, be filed by A. T. Siler, Chairman of this Commission, in the office of the Clerk of the Circuit Court of the county having jurisdiction, as provided by law, to the end that plaintiffs may recover of said defendant their respective sums.

It is further ordered that this order be recorded upon the record books of this Commission, and that a certified copy of this order be furnished to defendant.

This August 10, 1910.

A. T. SILER, *Chairman.*  
 L. P. TARLTON, *Commissioner.*  
 L. B. FINN, *Commissioner.*

32 STATE OF KENTUCKY,  
*County of Franklin, set:*

I, D. B. Cornett, Secretary of the Railroad Commission of Kentucky, hereby certify that the above and foregoing is a true and correct copy of an order as appears of record on the Order Book in the office of the Railroad Commission of Kentucky, at Frankfort, Kentucky.

This August 10, 1910.

D. B. CORNETT,  
*Secretary Railroad Commission.*

Exhibit "C," referred to and filed with the foregoing Bill of Complaint on Sept. 7, 1910, is in words and figures as follows, viz:

**"EXHIBIT C."**

**Copy.**

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY, WRIGHT & TAYLOR, OLD GRAN  
 Dad Distillery Company, Brown-Forman Co., S. Grabfelder &  
 Co., Bernheim Distilling Co., Taylor & Williams, Tom Moore  
 Distillery, Mattingly & Moore Distillery Co., F. G. Walker Co.,  
 Mueller, Wathen & Kober, Charles Kober & Co., Early Times  
 Distillery Company, Clear Springs Distillery Company, T. W.  
 Samuels Distillery, W. B. Samuels & Co., Willow Springs Distil-  
 ling Company, Blair, Osborne & Ballard Distilling Co., M. C.  
 Beam & Co., Head & Parker, Smith Distillery Company, R. Cum-  
 mins & Co., Burks Spring Distillery Company, Plaintiffs,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

*Petition.*

**Paragraph No. 1.**

Plaintiffs say that each of them is a corporation duly incorporated and empowered under the laws of Kentucky to transact the business in which they are now engaged, to contract and be contracted with, sue and be sued in their respective corporate names, and as such corporations are and were on the dates hereinafter stated engaged in the distillery business; that is to say, each and all are and were engaged in the manufacture, storage, preparation for market and sale of whiskey and other distillery products, and in the shipping of such products to and from their respective plants located upon the lines and at the following named stations of defendant, the Louisville and Nashville Railroad, to wit:

Greenbrier Distillery Company, Greenbrier, Ky.,  
 Wright & Taylor, Chapeze, Ky.,

33 Old Gran Dad Distillery Company, Hobbs, Ky.,

Brown-Forman Company, St. Mary's, Ky.,  
S. Grabfelder & Company, Clermont, Ky.,  
Bernheim Distilling Company, Silver Creek, Ky.,  
Taylor & Williams, Gethsemane, Ky.,  
Tom Moore Distillery, Bardstown, Ky.,  
Mattingly & Moore Distillery Company, Bardstown, Ky.,  
F. G. Walker Company, Bardstown, Ky.,  
Mueller, Wathen & Kobert, Lebanon, Ky.,  
Charles Kobert & Company, Lebanon, Ky.,  
Early Times Distillery Company, Early Times, Ky.,  
Clear Springs Distilling Company, Bardstown, Ky.,  
T. W. Samuels Distillery, Deatsville, Ky.,  
W. B. Samuels & Company, Samuels, Ky.,  
Willow Springs Distilling Company, Coon Hollow, Ky.,  
Blair, Osborne & Ballard Distilling Company, Chicago, Ky.,  
M. C. Beam & Company, Gethsemane, Ky.,  
Head & Parker, Gethsemane, Ky.,  
Smith Distillery Company, Chicago, Ky.,  
R. Cummins & Company, Loretto, Ky.,  
Burks Spring Distillery Company, Loretto, Ky.

Plaintiffs say that defendant, Louisville & Nashville Railroad Company, is a corporation duly incorporated and operated as a common carrier in various Counties in the State of Kentucky and elsewhere, and especially to and from the points hereinafter enumerated, shown in Exhibit A hereinafter more fully referred to.

Plaintiffs say that in order to carry on and operate their respective distilleries it is and was necessary for each of them to cause to be transported over defendant's lines from various points in Kentucky, as shown by said Exhibit, to their respective plants, various commodities necessary to be used by them, and as further shown by said Exhibit all for the purpose of use in the manufacture and preparation of whiskey and other distillery products for the markets.

Plaintiffs say that inasmuch as the present rates herein complained of, and the commodities upon which the same are and were assessed, as well as the former rates, points of origin and of destination, can be more conveniently compared, shown or illustrated in exhibit form, such an exhibit is hereto attached, marked "Exhibit A" and made part hereof as if fully set out herein.

Plaintiffs say that for many years prior to the 25th day of March, 1910, defendant transported over its line or lines of railroad to and from points wholly within the State of Kentucky, the various commodities shown in said exhibit, and charged, collected, and received from plaintiffs during said time the rates printed therein, from said points of origin to their said respective plants; that on the 15th day of March, 1910, defendant issued its Circular #2910 cancelling each and all of said printed rates shown in said Exhibit, and in lieu thereof—effective March 25, 1910—substituted therefor the rates designated new rates as shown by the figures inserted therein in red

ink, and for the transportation of all of said Commodities to and from the points shown in said Exhibit has ever since and still charges, collects and receives from plaintiffs the said increased rates as aforesaid.

Plaintiffs say that each and all of said increased rates so charged, collected and received from said points of origin to the respective plants of each of the plaintiffs as shown in said Exhibit, wherein the same are in excess of said former rates, are extortionate, unjust, and unreasonable; that defendant as aforesaid had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants upon the faith of said former rates, and had maintained said rates for many years as just and reasonable rates, all of which were and are fairly remunerative, and were and are no more than just and reasonable compensation for the transportation of said commodities to and from said points.

Wherefore, plaintiffs pray that this Honorable Commission, after due notice herein and investigation, make and fix just and reasonable rates to and from all points and upon all commodities as shown in said Exhibit A, and that said rates be fixed no higher than those charged, collected and received by the defendant for the transportation of said commodities to and from said points prior to the cancellation of said former rates effective March 25, 1910, as hereinbefore stated; and plaintiffs pray for all other necessary orders in the premises.

#### Paragraph 2.

For further cause of action herein plaintiffs reiterate and reaffirm all the allegations contained in the first paragraph herein, and say that by reason of the acts upon the part of the defendant set out in Paragraph No. 1, and especially the fact that defendant has continuously charged, collected and received from plaintiffs since the 25th day of March, 1910, and continues so to do, the increased rates shown in Exhibit A filed in Paragraph No. 1, defendant to the extent of the difference between said former rates and the present rates now in effect, as set out in said first Paragraph and said Exhibit A, has and continues to charge, collect and receive from plaintiffs and each of them, extortionate, unjust and unreasonable rates for the transportation of commodities named in said Exhibit A and the several Exhibits hereinafter filed by each of the plaintiffs herein, which latter Exhibits show the amount of such extortionate charges and collections from each of the plaintiffs to the dates therein respectively stated and which are, as follows, to wit:

#### EXHIBIT.

1. Greenbrier Distillery Company.....	\$532.62
2. Wright & Taylor.....	\$257.50
3. Old Gran Dad Distillery Company.....	\$231.38
4. Brown-Forman Company.....	\$
5. S. Grabfelder & Co.....	\$325.78
6. Bernheim Distilling Co.....	\$

35

7. Taylor & Williams.....	\$237.19
8. Tom Moore Distillery.....	\$ 44.51
9. Mattingly & Moore Distillery Co.....	\$
10. F. G. Walker & Co.....	\$
11. Mueller, Wathen & Kober.....	\$400.77
12. Charles Kober & Co.....	\$
13. Early Times Distillery Co.....	\$408.51
14. Clear Springs Distilling Co.....	\$481.89
15. T. W. Samuels Distillery.....	\$123.42
16. W. B. Samuels & Co.....	\$ 58.81
17. Willow Springs Distilling Co.....	\$321.62
18. Blair, Osborne & Ballard Distilling Co.....	\$ 42.96
19. M. C. Beam & Co.....	\$ 57.42
20. Head & Parker.....	\$ 44.80
21. Smith Distillery Company.....	\$
22. R. Cummins & Company.....	\$
23. Burks Spring Distillery Co.....	\$145.25

Wherefore plaintiffs pray that reparation be awarded each of them for the amounts shown to be severally due from their respective Exhibits hereinbefore referred to, and that an award be made to each of them by this Honorable Commission for said respective sums; and plaintiffs pray for all further and necessary orders and proceedings to which they may be entitled in the premises.

McCHORD, HINES & NORMAN,  
*Attorneys for Plaintiffs.*

Copy.

Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY, WRIGHT & TAYLOR, OLD GRAN  
Dad Distillery Company, Brown-Forman Company, S. Grabfelder  
& Co., Bernheim Distilling Company, Taylor & Williams, Tom  
Moore Distillery, Mattingly & Moore Distillery Company, F. G.  
Walker & Company, Mueller, Wathen & Kober, Charles Kober  
& Co., Early Times Distillery Company, Clear Springs Distilling  
Company, T. W. Samuels Distillery, W. B. Samuels & Co.,  
Willow Springs Distilling Co., Blair, Osborne & Ballard Distilling  
Co., M. C. Beam & Co., Head & Parker, Smith Distillery Com-  
pany, R. Cummins & Company, Burks Spring Distillery Com-  
pany, Plaintiffs,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

*Answer.*

Now comes the Defendant Louisville and Nashville Railroad Com-  
pany, and for answer herein states that it is true that it increased  
the rates as shown in Exhibit "A" of plaintiffs, yet Defendant de-

36 nies that the said increased rates so charged, collected or received from the points of origin mentioned in the petition to the respective plants of the plaintiffs, as shown in the aforesaid Exhibit, are extortionate or unjust, or unreasonable, and it further denies that this Defendant induced the plaintiffs, or each of them or any of them, to expend large sums of money in the erection of, or in making any additions to, their several plants, upon the faith of said former rates. While it is true it had maintained said rate for many years, it denies that these rates were fairly remunerative, and denies that said rates as they formerly were, prior to said advancement, were or are fairly remunerative, or that they were or are no more than just or reasonable compensation for the transportation of said commodities to or from said points.

It further denies that said increased rates are extortionate, unjust or unreasonable for the transportation of the commodities named in Exhibit "A." or the several Exhibits filed by the complainants herein, and denies that the complainant Greenbrier Distillery Company is entitled to recover the sum of \$532.62, or any other sum.

Defendant further denies that the plaintiff T. W. Samuels Distillery is entitled to recover \$123.48, or any other amount; that the Early Times Distillery Company is entitled to recover \$408.51, or any other amount; that Mueller, Wathen & Kober is entitled to recover \$400.77, or any other amount; that Tom Moore Distillery is entitled to recover \$44.51, or any other amount; that W. B. Samuels & Company is entitled to recover \$48.81, or any other amount; that M. C. Beam & Company is entitled to recover \$57.42, or any other amount; that Old Gran Dad Distillery Company is entitled to \$231.58, or any other amount; that Head & Parker is entitled to \$44.80, or any other amount; that Wright & Taylor is entitled to recover \$257.50, or any other amount; that Clear Springs Distilling Company is entitled to \$481.89, or any other amount; that S. Grabfelder & Company is entitled to \$325.78, or any other amount; that Taylor & Williams is entitled to recover \$237.19, or any other amount; that Willow Springs Distilling Company is entitled to \$321.62, or any other amount, that Blair, Osborne & Ballard Distilling Co. is entitled to \$42.96, or any other amount.

Wherefore, having fully answered, this defendant prays that the complaint be dismissed, and for all proper relief in the premises.

(Signed)

WM. G. DEARING,  
Attorney L. & N. R. R.

Filed Sept. 7, 1910. Chas. N. Wiard, Clerk.

Exhibit "D," referred to and filed with the foregoing Bill of Complaint on Sept. 7, A. D., 1910, is in words and figures as follows, *viz*:

(Here follows Exhibit D, marked page 37.)

## Explanation of

C. L.—Carload. L. C. L.—Less than carload. K. D.—Knock

Net Rates in Cents per Hundred

To—	From—	Bbl. & box m'tl, K. D. C. L., min. wt. 30,000 lbs.	L. C. L.	Barrels, empty; C. L., Min. 120 bbls., per bbl.	Bottle metal, quant. Old.
		Old. New. [\$]	Old. New. [\$]	Old. New. [\$]	Old.
Bardstown, Ky.	(Covington (proper) Ky.), 11 *11	23	28	14	28
"	(Newport (proper) Ky.).				43
Chapeze, Ky.	Louisville (proper) Ky....	6	6	15	15
Chicago, Ky.	Louisville (proper) Ky....	5	5	13	13
Clermont, Ky.	Louisville (proper) Ky....	7	7	15	22
Coon Hollow, Ky.	Louisville, Ky. (proper)...	6	5	15	13
"	(Covington (proper) Ky.), 12 12	20.5	34	14	34
Deatsville, Ky.	(Newport (proper) Ky.).				37.5
Early Times, Ky.	Louisville (proper) Ky....	7	7	15	22
Gethsemane, Ky.	Louisville (proper) Ky....	6	7	15	15
Greenbrier, Ky.	Louisville, (proper) Ky....	6	7	15	21
Hobbs, Ky.	Louisville, (proper) Ky....	6	5	15	21
Hunters, Ky.	Louisville (proper) Ky....	6	5	15	13
Lebanon, Ky.	Louisville (proper) Ky....	6	5	15	13
Loretto, Ky.	Louisville (proper) Ky....	7	8	15	26
St. Marys, Ky.	Louisville (proper) Ky....	7	8	15	24
Samuels, Ky.	Louisville (proper) Ky....	6	6	15	15
Silver Creek, Ky.	(Covington (proper) Ky.), 10 10	19	19	12	19
"	(Newport (proper) Ky.).				35
	Louisville (proper) Ky....	10	10	19	19

## NOTE:

\* New minimum 10,000 lbs. per 100 lbs.

† " " 24,000 lbs.

‡ New boxes, wooden, empty. C. L. minimum 15,000 lbs.

§ Columns marked thus written in red ink.

EXHIBIT D.

*Explanation of Abbreviations.*

L. C. L.—Less than carload. K. D.—Knocked down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight.

*Net Rates in Cents per Hundred Lbs. unless Otherwise Specified.*

Bbl. & box m'tl, K. D. C. L., min. wt. 30,000 lbs. Old. New. [§] (y.)	Barrels, empty; C. L., Min. 120 bbls., per bbl.		Bottle caps, metal, any quantity.		Bottle covers, paper or straw, packed or pressed in bales.		Bottles, common, packed, released.		Boxes, empty, any qty.		Com, Rye, malt, bar- ley; C. L., min. wt. 24,000 lbs. Old. New. [§] (y.)		Iron, hoop; C. L., min. wt. 24,000 pounds. Old. New. [§]	
	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)	Old. New. [§] (y.)
11 *11 23 28	14 28	43 43	23 28	29 32	25 30	31.5 37	28 28	10 16	.... ..					
6 6 15 15	9 15	23 23	15 15	20 17	16 16	17 20	15 15	5 8	.... ..					
5 5 13 23	9 13	20 20	13 13	17 15	10 14	15 17	13 13	5 8	8 13					
7 7 15 22	10 22	26 32	15 22	23 28	17 24	20 28	15 22	6 10	12.5 21					
6 5 15 13	9 13	23 20	15 13	20 15	16 14	17 17	15 13	5 8	.... ..					
12 12 20.5 34	14 34	37.5 50	20.5 34	33 38	23.5 36	28.5 44	21.5 34	11 18	17 29					
7 7 15 22	10 22	26 32	15 22	23 26	17 24	20 28	15 22	6 10	12.5 21					
6 6 15 15	9 15	23 23	15 15	20 17	16 16	17 20	15 15	5 8	.... ..					
6 7 15 21	9 21	23 30	15 21	20 23	16 22	17 27	15 21	5 10	.... ..					
6 7 15 21	10 21	26 30	15 21	20 23	17 22	20 27	15 21	6 10	12.5 21					
6 7 15 21	9 21	23 30	15 21	20 23	16 22	17 27	15 21	5 10	.... ..					
6 5 15 13	9 13	23 20	15 13	20 15	16 14	17 17	15 13	5 8	.... ..					
6 5 15 13	9 13	23 20	15 13	20 15	16 14	17 17	15 13	5 8	.... ..					
7 8 15 26	10 26	26 39	15 26	23 31	17 25	20 34	15 26	6 11	12.5 21					
7 7 15 23	10 23	26 34	15 23	23 26	17 25	20 30	15 23	6 11	12.5 21					
7 8 15 24	10 24	26 35	15 24	23 28	17 26	20 31	15 24	6 11	12.5 21					
6 6 15 15	9 15	23 23	15 15	20 17	16 16	17 20	15 15	5 8	.... ..					
10 10 19 19	12 19	35 35	19 19	31 25	21 21	25 31	19 19	10 13	.... ..					
10 10 19 19	12 19	35 35	19 19	31 25	21 21	25 31	19 19	10 13	.... ..					

Minimum 15,000 lbs.  
ink.

38 On the same day, to wit: on the 7th day of September, A. D., 1910, an order was made and entered in said cause, which said order is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky, at Frankfort, Wednesday, September 7, 1910.

Court met pursuant to adjournment.  
Present: Honorable A. M. J. Cochran, Judge.

#686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,  
versus

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

The Complainant moved the Court to grant to it a preliminary writ of injunction in accordance with the prayer of the Bill of Complaint, and said Motion is now fixed for hearing on the 26th day of September 1910, at 2 P. M., in the Court Room in the City of Frankfort, Kentucky, and it having been made to appear that there is danger of irreparable injury being caused complainant before the hearing of said application for the writ of injunction unless said defendants are, pending said hearing, restrained as therein set forth, it is now ordered that a restraining order be granted and that Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of the State of Kentucky, are restrained and enjoined from continuing or putting into force or effect their orders of August 10, 1910, reducing the railroad rates of the Complainant on intrastate freight, being the following named commodities between the points of origin and points of destination, and making and fixing the rates as herein below named, to wit:

*Explanation of Abbreviations.*

C. L.—Car Load. L. C. L.—Less Car Load. K. D.—Knocked Down. Lbs.—Pounds. Min.—Minimum. Wt.—Weight. Btl.—Bottles. Bbl.—Barrel.

*Rates in Cents per Hundred Pounds unless Otherwise Specified.*

To—	From—	Bbl.-box material, [Bbls., empty; Btl. caps, metal, min. weight, 30,000 lbs., per 20 bbls., per quantity.]	Bots., covs., paper or straw, packed or pressed in bales; min. weight, 15,000 lbs., per 24,000 lbs.	Bots., comm., packed or released; min. weight, 24,000 lbs., per 24,000 lbs.	Boxes, empty, any quantity.	Corn, rye, malt, or barley; min. weight, 24,000 lbs.
C. L.	L. C. L.	C. L.	C. L.	C. L.	C. L.	C. L.
Bardstown, Ky., Covington (prop.), Ky.	11	23	14	43	23	29
Newport (prop.),					25	31½
Louisville, Ky., .....	6	15	9	23	15	17
Louisville, Ky., .....	5	13	9	20	13	10
Louisville, Ky., .....	7	15	10	26	15	20
Louisville, Ky., .....	5	13	9	20	13	17
Covington, Ky., .....	12	20½	14	20½	33	23½
Newport, Ky., .....						28½
Louisville, Ky., .....	7	15	10	26	15	17
Louisville, Ky., .....	6	15	9	23	15	17
Louisville, Ky., .....	6	15	9	23	15	17
Louisville, Ky., .....	6	15	10	26	15	17
Louisville, Ky., .....	5	15	9	23	15	17
Louisville, Ky., .....	5	13	9	23	15	17
Louisville, Ky., .....	7	15	10	26	15	20
Louisville, Ky., .....	7	15	10	26	15	20
Louisville, Ky., .....	7	15	10	26	15	20
Louisville, Ky., .....	6	15	9	23	15	17
Covington, Ky., .....	10	19	12	35	19	31
Newport, Ky., .....	10	19	12	35	19	31
Louisville, Ky., .....	10	19	12	35	19	31
Eminence, Ky., Louisville, Ky., .....	6	15	10	25	17	22
						18
						17
						17

40 or putting into force and effect the schedule of said rates or any of them, and said defendants also are restrained and enjoined, individually and jointly, as constituting said Railroad Commission of Kentucky, from recommending or causing to be instituted any prosecution by indictment or other legal proceeding against the Complainant or any of its officers agents, or employes to recover any fine or penalty imposed by Section 820-A of the Kentucky Statutes, commonly known as the McChord Act, or upon any cause of action or ground whatever for or on account of Complainant's failure or refusal to put into force and effect the Railroad Commission's orders or any of them aforementioned, or the rates fixed and prepared thereunder, and said defendants are also restrained and enjoined, individually and jointly as constituting the Railroad Commission of Kentucky, and especially Adam T. Siler, as Chairman of said Railroad Commission, is enjoined from taking any steps to enforce the Order, Finding, and Award of August 10, 1910, whereunder, among other things, award of reparation was ordered to be made by this complainant to the Greenbrier Distillery Company and other plaintiffs, and is especially enjoined from filing a certified copy of said Order, Finding, and Award of August 10, 1910, with or without the evidence heard, in the Office of the Clerk of the Circuit Court of any County having jurisdiction as provided by law, or of any County into or through which the line or lines of road owned or operated by this Complainant carrying the freight as to which the award of reparation in said Order, Finding, and Award was made, or of any other County within the State of Kentucky; and that said defendants, individually and jointly as aforesaid, are so restrained and enjoined until a hearing upon said application for writ of injunction and the further order of the Court in the premises.

Leave is granted to the defendants to apply for an earlier hearing of said motion, if they so desire. The first day of the next September Term of this Court at Frankfort, is fixed because it is thought by the Court that it is more convenient to the parties to hear the motion at that place.

On a day following, to-wit: on the 26th day of September, A. D., 1910, the following order was made and entered herein, same being in word and figures as follows, viz:

41      United States Circuit Court, Eastern District of Kentucky,  
Frankfort Division, September 26, 1910.

Proceedings of the Circuit Court of the United States for the Sixth  
Judicial Circuit and Eastern District of Kentucky, at a Regular  
Term Begun and Held at the Federal Court room in the City of  
Frankfort, on Monday, September 26, 1910.

Court met.

Present: Hon. A. M. J. Cochran, Judge.

686.

LOUISVILLE & NASHVILLE R. R. Co.

vs.

ADAM T. SILER et al.

This cause coming on to be heard upon the motion of the complainant for a preliminary writ of injunction, came the complainant by Henry L. Stone, its counsel, and the defendants by James Breathitt, Jno. F. Lockett, and McChord and Hines, their counsel.

The defendants by their said counsel filed a demurrer to part of the bill and a demurrer to the whole of the bill, also the affidavits of Adam T. Siler, Lawrence B. Finn, R. H. Edelen and W. A. Miller and by consent are granted further time to prepare and file the affidavit of Lew P. Tarlton, all of said affidavits to be read and considered on the hearing of said motion.

The complainant filed the affidavits of C. B. Compton and D. M. Goodwyn to be read and considered upon said hearings.

Whereupon the judge of this court now sitting declined to sit further in this case and stated that he would certify this fact to the Honorable Henry F. Severens, presiding circuit judge for this circuit that the matter could be properly heard and determined.

The affidavit of C. B. Compton, referred to in the foregoing order and filed on September 26, 1910, by the complainant, is in words and figures as follows, viz:

## 42 In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Affidavit of C. B. Compton.*

Filed by Complainant in Court September 26, 1910.

The affiant, C. B. Compton, states that he is 55 years of age; resides in Louisville, Kentucky; and has been for the past nine and one-half years traffic manager of the Louisville & Nashville Railroad Company, complainant herein; that he has had over thirty-eight years' experience in the railroad business, having served the Louisville & Nashville Railroad Company during that period in various clerkships in the Freight Department and as local agent, contracting freight agent, general agent, general freight agent, and traffic manager.

Affiant states that he is familiar with the freight rates of said company, and that during his employment as general freight agent and traffic manager he has been directly connected with the making of said freight rates, and that in the performance of his duties it has been necessary for him to investigate, analyze and constantly keep in touch with the numerous and varying conditions surrounding and affecting the freight business of the company and of the various cities and communities served by it; and that by reason of their influence on the interests of said company it has also been necessary for him to investigate and analyze the geographical, physical, commercial and industrial conditions prevailing in the State of Kentucky and other States in the territory south of the Ohio and Potomac rivers and east of the Mississippi River, in which territory lies the greater part of the railroad of said Louisville & Nashville Railroad Company. Affiant further says that he has also, but to a lesser extent, investigated and analyzed traffic conditions existing in other territories within the United States.

Affiant states that he is familiar with the subject matter of this proceeding, and that by reason of his experience and employment he is qualified to testify concerning the same.

Affiant states that for a long time prior to March 25, 1910, as a means of promoting, encouraging and increasing the manufacture of whiskey and the shipment thereof by way of its lines of railroad, said railroad company gave to the distilleries located along 43 its lines of railroad in Kentucky rates for the transportation of their supplies, such as corn, rye, malt, barley, barrel and

box material, empty barrels, bottle caps, bottle covers, bottles, empty boxes, hoop iron, etc., which were less than the rates charged by said railroad company between the same points of origin and destination upon the same articles when intended for and devoted to uses other than the manufacture and shipment of whiskey; that the giving of said special rates upon said articles, characterized as distillers' supplies, extended as far back as 1874, the said rates being made from season to season as the conditions and exigencies of the distillery business seemed to require; that until January 1, 1899, all of said special rates were made or constructed upon the same general basis, but upon that date still lower special rates were given said distillers on their corn, rye, malt and barley, because of the extremely depressed condition of the whiskey trade at that time; that until the passage by Congress of the so-called Hepburn Act, amending the Act to Regulate Commerce, all of said special rates were applied to both interstate and intrastate shipments; that shortly thereafter the Interstate Commerce Commission objected to the restricted application of said special rates upon interstate traffic, and also to the method of protecting them, to-wit, by billing said shipments at the standard rates and subsequently refunding to said distillers the difference between said standard rates and said special rates applicable to articles used in the manufacture and shipment of whiskey, whereupon said railroad company cancelled and withdrew said special rates as to all interstate traffic and thereafter, until March 25, 1910, applied them only to intrastate traffic within the State of Kentucky.

Affiant states that thereupon, and thereby said railroad company was likely to be forced into discrimination between intrastate and interstate traffic of the same character used for the same purpose between the same points of origin and destination; that in his capacity aforesaid, affiant investigated the history of said special rates and reached the conclusion that the conditions which had justified the making of them in the beginning had disappeared; that said distillers were established upon a firm business footing and no longer needed the assistance that had been extended to them by means of said special rates; that said special rates were not a matter of contract between said distillers or any of them and said railroad company, but had been made and extended to them as the voluntary act of said railroad company in its efforts to promote, encourage and increase the manufacture of whiskey and the shipment thereof over its lines of railroad; and affiant states that upon reaching such conclusion he, in his capacity aforesaid, cancelled and withdrew said special rates in their entirety; that since the date of said cancellation and withdrawal, namely, March 25, 1910, the said railroad company has charged and collected, for the transportation of corn, rye, malt, barley, barrel and box material, empty barrels, bottle caps, bottle covers, bottles, empty boxes, hoop iron, etc., consigned to distillers and intended for use in the manufacture and shipment of whiskey, exactly the same rates as had been and were being charged and collected between the same points of origin and destination upon the same articles where con-

signed to other persons and intended for other uses; and that by and as the result of said action, said railroad company removed every sort and species of discrimination theretofore existing with respect to its traffic in said articles.

Affiant states that in view of the disappearance and cessation of the conditions which had originally justified the voluntary concessions to said distillers represented by said special rates, the said rates had become unjustly, unreasonably and absurdly low and a moral offense against those persons who were paying the higher or standard rates of said company, upon said articles when intended for and devoted to other uses than the manufacture and shipment of whiskey.

Affiant states that the rates charged and collected for the transportation of said articles on and after March 25, 1910, were and are the just and reasonable standard rates of said Louisville & Nashville Railroad Company; that they compare favorably with the rates charged and collected on the remaining portions of its Kentucky lines and upon its lines in the numerous other States in which said railroad company operates, and also with the rates charged and collected by other railroad companies for similar transportation in Kentucky and other States.

Affiant states that there was not then and has not been since, any complaint made by shippers or receivers of said articles when intended for and devoted to uses other than the manufacture and shipment of whiskey who had previously paid, were then paying, and have since continued to pay the higher or standard rates of said railroad company, but that soon after the cancellation and withdrawal of said special rates, various distillers who had been beneficiaries thereof filed a complaint with the Railroad Commission of Kentucky against said railroad company praying, amongst other things, for an order requiring and compelling it to restore said special rates. Affiant is informed and believes that no shipper, receiver or user of said articles for purposes other than the manufacture and shipment of whiskey was a party to said complaint, or took any part in the prosecution thereof.

Affiant states that on the 10th day of August, 1910, said Railroad Commission of Kentucky entered certain orders among other things declaring the rates then charged for the transportation of said articles (which said rates were the standard rates of said Louisville & Nashville Railroad Company as hereinbefore described) to be extortionate, unjust and unreasonable, and forbidding said railroad company to charge, collect or receive, for the transportation of said articles, rates in excess of those which said railroad company had prior to March 25, 1910, applied to said articles when intended for and used in the manufacture and shipment of whiskey.

Affiant states, in other words, that said orders were intended 45 to and did have the effect of fixing rates to be charged by said railroad company for the transportation, between the points specified therein of the articles named without reference to the uses or purposes to which such articles were to be applied by the consignees thereof; and of commanding and requiring said rail-

road company to apply the said rates to the shipments of said articles made by any and all persons, whether manufacturers and shippers of whiskey or otherwise and wholly without regard to the uses or purposes to which said articles were to be applied by the consignees thereof.

Affiant states that said orders of said Railroad Commission of Kentucky are arbitrary, unreasonable and unjust;

First. Because they seek to compel said railroad company to perpetuate the special rates voluntarily given by it to said distillers, notwithstanding the conditions in consideration of which said railroad company granted said rates in the beginning had disappeared and ceased to exist long prior to March 25, 1910.

Second. Because they seek to compel said railroad company to apply the said rates to the traffic in said articles of any and all persons shipping from and to the points specified, thus giving to said special rates a broader application than was ever voluntarily given by said railroad company, notwithstanding the fact that as between said railroad company and the shippers, receivers and users of said articles for other purposes than the manufacture and shipment of whiskey, there is a complete absence of the conditions and considerations which induced said railroad company voluntarily to give said special rates in the beginning.

Third. Because the said orders, in seeking to compel said railroad company to apply upon said articles between the points specified rates which are materially less than are applied thereto between other points in the State, will, if enforced, compel said railroad company to unjustly discriminate between different sections of the State, or else to apply the said rates without distinction or discrimination between all points on its lines in the State.

Fourth. Because said orders, if enforced, will compel said railroad company to discriminate in favor of intrastate traffic and against interstate traffic of the same character between the same points in the State of Kentucky, or else to apply the said rates without distinction or discrimination to both intrastate and interstate traffic between all points in said State of Kentucky.

Fifth. Because the said orders, if enforced, will compel said railroad company to charge materially less rates in one direction than in the other between the same points, on both intrastate and interstate traffic, or else to apply said rates without distinction or discrimination in both directions between all points.

Sixth. Because said orders, if enforced, will compel said railroad company to charge less rates upon corn, rye, malt and barley than upon wheat, oats and other kinds of grain where said railroad company has always endeavored to charge the same rate upon all kinds of grain, or else to apply the rates fixed in said orders to all kinds of grain upon both intrastate and interstate traffic.

Seventh. Because said orders, if enforced, will compel said railroad company to charge less rates upon carload quantities of grain, where said railroad company has always endeavored to charge the same rate upon carload as upon less than carload quantities, or else

to establish less rates for carload than for less than carload quantities of grain upon both intrastate and interstate traffic.

Eighth. Because said orders, if enforced, will compel said railroad company to accept upon interstate as well as intrastate traffic, rates which are absurdly, unusually, unjustly and unreasonably low, both per se and relatively, and which will not yield to said railroad company fair and reasonable compensation for the service performed, and which will deprive said railroad company of the fair and reasonable return which it is entitled to earn upon the property it devotes to the public use, upon interstate as well as intrastate traffic.

Ninth. Because said orders, if enforced, will compel said railroad company to charge a less rate for a long haul than for a short haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and of the United States, or else to apply said rates as maxima between all intermediate points upon interstate as well as intrastate traffic, unless relieved therefrom by the order of said Commission and of the Interstate Commerce Commission.

Tenth. Because said orders, if enforced, will inflict upon said railroad company a considerable loss of revenue and income upon interstate as well as intrastate traffic, with no compensating benefits whatsoever and in the face of the fact that there has been in the last few years a heavy increase in the cost of labor, material, supplies and every other element entering into the expense of operating said railroad company's lines.

In substantiation of the facts, conclusions and opinions set forth in the ten paragraphs immediately preceding, affiant states:

First. The concessions represented by said special rates on distillers' supplies, were first granted by said railroad company at a time when the distilling industry upon its lines in Kentucky was in a demoralized and precarious condition, because of their competition with the manufacturers of cheap whiskey and with blenders and rectifiers located on and north of the Ohio River. Said industry was carried on at small country points where primarily an abundant supply of pure water could be relied upon, and where it was expected the surrounding farms would furnish some portion of the grain necessary for distilling purposes. It was also expected that immunity from city taxes and other expenses incidental to manufacturing within the cities would tend to minimize the cost of production. In course of time, however, the inroads of the competition referred to, coupled with failure of grain crops, drouths and other unfor-seen happenings, placed said country distillers at a material disadvantage; in that they were frequently compelled to bring in from distant points grain, water, fuel and supplies of all kinds, the

47 transportation charges upon which added materially to the cost of their product. The few distillers who were making

high grade special brands were not materially affected by the majority, who were turning out the ordinary grades, found their markets being gradually closed to them by reason of the high cost of their supplies, and their competition with manufacturers of cheap whiskey and with blenders and rectifiers on and north of the Ohio River. In this situation said Louisville & Nash-

ville Railroad Company, finding itself about to be deprived of the whiskey traffic which it had as a matter of business policy, labored to build up and maintain, made common cause with its distillers and voluntarily gave to them an unusually low scale of rates on their grain and supplies in the expectation and assurance that they would be withdrawn whenever the conditions changed for the better. For these reasons, said railroad company never guaranteed said rates or promised to protect them beyond the end of the current distilling season, and invariably thereafter said rates were restored, revised and modified from season to season as existing conditions seemed to require. Affiant states that as a result of said co-operative action, the distilling industry upon said railroad company's lines in Kentucky gradually recovered its footing, and that at the present time there are forty-eight of these country stations on its lines in Kentucky at which distillers are located, namely:

Athertonville	Early Times	Levingood
Bardstown	Eminence	Loretto
Berry	Falmouth	Lotus
Bloomfield	Garnett	Memphis Junction
Bourbon	Gethsemane	Morgan
Boyd	Gilbert	Nazareth
Calvary	Greenbrier	New Hope
Campbellsville	Haden	Poindexter
Chapeze	Hobbs	Robinson
Chicago	Hunters	St. Marys
Clermont	Jett	Samuels
Coon Hollow	Kellers	Shawhan
Crab Orchard	Kiserton	Silver Creek
Cynthiana	Lair	Silver Springs
Dants	Lancaster	Willow Springs
Deatsville	Lebanon	Withrow

Affiant is informed and believes that the disadvantages under which said industry labored in the beginning and for many years thereafter have entirely disappeared, and that it is not only no longer in need of the special rates which under the conditions then existing said railroad company gladly gave, but affiant believes and states that in the past few years enormous fortunes have been made from the distilling industry along its lines in Kentucky, and that there is no longer any reason or justification for extending to said industry lower rates on any articles necessary to the manufacture

48 and shipment of whiskey, than the standard rates of said company as applied to the same articles when intended for and devoted to other uses. During the time that said rates were in effect, affiant states that said railroad company was influenced solely by the representations of said distilling interests that without such assistance the distilleries could not be kept in operation, and by the certain knowledge that their closing down would take away from said railroad company, a large and fairly profitable traffic in the transportation of whiskey from said distilleries to the markets of consumption, affiant states that it was never contemplated or ex-

pected that said rates would be perpetuated or even extended beyond the end of the current season; but affiant states that the said orders of the railroad Commission of Kentucky, if enforced, will perpetuate said rates.

Second. Affiant states that the said special rates given on distillers' supplies prior to March 25, 1910, were materially lower in the majority of instances than the standard rates that were simultaneously charged from and to the same points on the same articles when intended for and devoted to other uses than the manufacture and shipment of whiskey, and in substantiation thereof prays leave to refer to Exhibit D to the bill of complaint herein. Affiant further prays leave to explain that said exhibit is incomplete, in that while it shows certain of the distillers' rates (indicated in black or typewritten figures) to have been greater than the standard rates (indicated in red ink figures), it failed to show that in such cases the distillers received the benefit of the lower rates and were not required to pay the rates indicated in the exhibit. Affiant states that at the time of its transportation, all the property described, whether for distillers' use or for other purposes, was charged for on basis of the standard rates indicated in red ink, and that the special distillers' rates were protected by refunding the excess upon the filing of a claim by the distiller, and the submission by him of evidence that the property had been used in the manufacture and shipment of whiskey, and for that reason no claims were ever filed and no refunds could be made where said standard rates were either the same as or less than the distillers' rates indicated in black ink. Affiant further states that said distillers' rates were frequently renewed from season to season without checking the same against and making alterations to correspond with the changes in the standard rates then current, and that that omission accounts for all those instances where said Exhibit D shows the distillers' rates to have been greater than the standard rates.

Affiant states that said Exhibit D shows that on barrel and box material in carloads, the distillers' rates were either as low as or one cent per 100 pounds less than the standard rates.

That on box and barrel material in less carload quantities, the distillers' rates were either as low as or from six to thirteen and one-half cents per 100 pounds less than the standard rates.

That on empty barrels in carloads, the distillers' rates were from four to sixteen cents per barrel less than the standard rates.

That on metal bottle caps, regardless of quantity, the distillers' rates were either as low as or from four to thirteen cents per 100 pounds less than the standard rates.

That on bottle covers in carloads, the distillers' rates were either as low as or from six to thirteen and one-half cents per 100 pounds less than the standard rates.

That on bottle covers in less carload quantities, the distillers' rates were either as low as or from three to eight cents per 100 pounds less than the standard rates.

That on bottles in carloads, the distillers' rates were either as low

as or from four to twelve and one-half cents per 100 pounds less than the standard rates.

That on bottles in ten carload quantities, the distillers' rates were either as low as or from two to fourteen cents per 100 pounds less than the standard rates.

That on empty boxes, regardless of quantity, the distillers' rates were either as low as or from six to twelve and one-half cents per 100 pounds less than the standard rates.

That on hoop iron in carloads, the distillers' rates were from five to twelve cents per 100 pounds less than the standard rates.

Affiant states that the rates shown on said Exhibit D in red ink and herein characterized as standard rates, were and are the rates charged by said railroad company upon the commodities named when intended for and devoted to any and all purposes other than the manufacture and shipment of whiskey, and are also the rates that have been charged on distillers' supplies since March 25, 1910. Affiant states, therefore, that the direct and immediate effect of said orders, if enforced, will be to compel said railroad company to transport said articles for any and all persons, from and to the points named on basis of said distillers' rates irrespectively of the uses to which said articles are to be applied; that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified; that a large proportion of such movement is and will be devoted to uses other than the manufacture and shipment of whiskey and that to the extent that said articles are not applied to the manufacture and shipment of whiskey, said railroad company will be compelled to apply said distillers' rates thereon without receiving in any way, shape or form the considerations and benefits that induced it in the beginning and for a long time thereafter to give said rates to said distillers, and that the difference between the revenue accruing on said articles on basis of the just and reasonable standard rates of said railroad company and on bases of said distillers' rates ordered to be applied thereto by said order of the Railroad Commission will amount to many thousands of dollars annually, and to that extent constitute irrevocable loss of revenue to said railroad company.

Third. Affiant states that the standard rates of said railroad company as applied to said articles when devoted to other uses than the manufacture and shipment of whiskey from and to the points specified, are made upon the same scale or basis that has been employed for a great many years by said railroad company in making its rates

on said articles from and to other points in the State of 50 Kentucky; that the points of destination specified in said orders, sixteen in number, constitute but one-third of the country stations on said railroad company's lines in Kentucky at which distilleries are located, and constitute but a very small proportion of the number of destinations on said railroad company's lines in Kentucky to which there is and will continue to be a movement of traffic in said articles; that, therefore, the effect of said orders, if literally enforced, will be to compel said railroad company to give lower rates to the points of destination specified in said or-

ders than to the numerous other points of destination on its line in the State, and thus compel it to unjustly discriminate in favor of the sixteen points of destination embraced in said orders and against the numerous other points of destination not embraced therein. Affiant states that he is thoroughly familiar with the circumstances and conditions attending the movement of said articles in the State of Kentucky and existing at the various points of destination on said railroad company's lines in said State, and that in his opinion, based upon his knowledge and experience, no circumstance or condition exists by reason of which the sixteen points of destination embraced in said orders are morally or equitably entitled to a lower plane of rates on said articles than has been and is extended by said railroad company to the numerous points of destination not embraced in said order.

Affiant states that such unjust discrimination inevitably resulting from a literal enforcement of said orders, can only be avoided by said railroad company's reducing its standard rates on said articles all over the State to the level of the rates fixed in said orders to said sixteen points of destination embraced therein, and that as the movement of said articles is large and important, such action on the part of said railroad company would subject it to the loss of a considerable portion of its legitimate income without any compensating benefits whatsoever.

Fourth. Affiant states that all of the articles used by said distillers in the manufacture and shipment of whiskey are produced in other States as well as in Kentucky; that said distilling industry has grown to such magnitude that it is no longer possible to secure all of said articles within the State of Kentucky; that for that reason a considerable volume of said articles has moved, is moving and will continue to move in interstate commerce from points in other States to said distillery points in the State of Kentucky; that there are no through rates on said articles from points outside the State to points within the State, and that, therefore, the transportation charges on such articles in interstate commerce are assessed by combining the rate from the point of origin to Louisville, Ky., to Covington, Ky., or to Newport, Ky. (at which point such shipments enter the State) with the rates from those points to the points of destination in Kentucky; that prior to the passage of the so-called Hepburn Act amending the Act to Regulate Commerce, said railroad company in assessing its rates made no distinction between intrastate and interstate commerce, but charged from Louisville, Ky., from Covington, Ky., and from Newport, Ky., to said distilling

points in Kentucky, exactly the same rate upon shipments  
51 coming from without the State as upon shipments originating at Louisville, Covington or Newport proper, and in affiant's opinion, no circumstance or condition exists by reason of which shipments of said articles originating at Louisville, Covington or Newport are entitled to be transported to said distilling points at less rates than are assessed from those points on interstate shipments coming from without the State. Affiant states that the Interstate Commerce Commission objected to said railroad company's

charging less rates upon shipments of said articles when intended for and devoted to the manufacture and shipment of whiskey than when intended for and devoted to other uses, holding that said railroad company had no right to dictate the uses to which the property transported should be put; that by reason of such objection said railroad company ceased to apply said distillers' rates, and thereafter charged on interstate shipments of said articles the higher or standard rates set forth in red ink on Exhibit D to the Bill of Complaint herein, because said railroad company could not stand the heavy losses of revenue that would have resulted from the application of said distillers' rates in the manner stipulated by said Interstate Commerce Commission, namely, by applying them without restriction to the shipments of said articles by any and all persons from and to the points in question; that thereafter, when interstate shippers complained of being discriminated against, affiant knew of no circumstance or condition existing to justify the difference between its intrastate and interstate rates on said articles, and was informed and believed that if said complaint were prosecuted to a conclusion the Interstate Commerce Commission would compel said interstate rates to be reduced to the level of said intrastate rates and be applied to all shipments of said articles whether intended for and devoted to the manufacture and shipment of whiskey or to other purposes; that thereupon the said distillers' rates were cancelled and withdrawn in their entirety and all shipments of said articles were thereafter charged for at the same rate whether intrastate or interstate and whether intended for and devoted to the manufacture and shipment of whiskey or to other uses, and since March 25, 1910, said railroad company has not been guilty of any discrimination whatsoever in the application of its rates upon said articles. But affiant states that said orders, if enforced, will revive and renew the discrimination formerly existing and that in removing the same said railroad company will have no recourse but to reduce its interstate rates from and to the points therein specified to the level of the intrastate rates thus fixed by said Railroad Commission, and when that is done another unjustifiable discrimination will be created as between the points of destination embraced in said orders and numerous other points in the State.

As illustrative of the various discriminations that will arise from the enforcement of said orders, affiant prays leave to submit the following table of rates on corn, rye, malt and barely from Louisville to Lebanon and to stations intermediate to and beyond Lebanon.

*Corn, Rye, Malt, and Barley.*

From Louisville, Ky., to—	Distance.	Rates now charged, both State & inter- state, ir- spective of use to which de- voted.	Rates fixed in order of Ky. R. R. Com.	Rates which must be estab- lished, both State and in- tersate, to pre- vent unjust discrimination and violation of long & short haul principle.	Amount of reduc- tion.
Strawberry, Ky. ....	6	5	..	..	..
Hoertz, Ky. ....	8	5	..	..	..
South Park, Ky. ....	10	5	..	..	..
Coral Ridge, Ky. ....	11	6	..	6	..
Brooks, Ky. ....	13	6	..	6	..
Tappan, Ky. ....	14	6	..	6	..
Hubers, Ky. ....	15	6	..	6	..
Gap in Knob. ....	16	7	..	6	1
Shepherdsville, Ky. ....	18	7	..	6	1
Salt River, Ky. ....	19	7	..	6	1
Bardstown Jct., Ky. ....	22	8	..	6	2
Belmont, Ky. ....	25	8	..	6	2
Lebanon Jct., Ky. ....	30	8	..	6	2
Smith's Switch, Ky. ....	33	9	..	6	3
Boston, Ky. ....	34	9	..	6	3
Beech Fork, Ky. ....	37	9	..	6	3
Nelsonville, Ky. ....	39	9	..	6	3
Lyons, Ky. ....	43	10	..	6	4
Athertonville, Ky. ....	44	10	..	6	4
New Haven, Ky. ....	45	10	..	6	4
Gethsemane, Ky. ....	48	10	6	6	4
New Hope, Ky. ....	50	10	..	6	4
Willow Spring, Ky. ....	51	10	..	6	4
Coon Hollow, Ky. ....	52	10	6	6	4
Dants, Ky. ....	53	10	..	6	4
Chicago, Ky. ....	55	10	6	6	4
Loretto, Ky. ....	57	11	6	6	5
Lofty, Ky. ....	61	11	..	6	5
St. Marys, Ky. ....	62	11	6	6	5
Lebanon, Ky. ....	67	12	6	6	6
Matson, Ky. ....	68	12	..	..	5
Amboy, Ky. ....	72	12	..	..	5
Penleks, Ky. ....	73	12	..	..	5
Wanda, Ky. ....	74	13	..	..	6
Rileys, Ky. ....	77	13	..	..	6
Gravel Switch, Ky. ....	79	14	..	..	7
Aliceton, Ky. ....	81	14	..	..	7
Brumfield, Ky. ....	84	14	..	8	6
Mitchellsburg, Ky. ....	86	14	..	8	6
Cozatt, Ky. ....	88	14	..	8	6
Parksville, Ky. ....	89	14	..	8	6
Alum Springs, Ky. ....	93	14	..	8	6
Shelby City, Ky. ....	96	14	..	8	6
Baughman's Mill, Ky. ....	103	14	..	9	5
Stanford, Ky. ....	104	14	..	9	5
Rowland, Ky. ....	105	14	..	9	5
Haden, Ky. ....	107	14	..	9	5
Gilbert, Ky. ....	110	14	..	9	5

53 Affiant states that if said railroad company should continue to charge its present rates to the stations between Matson and Gilbert, inclusive, the abrupt jump from 6 cents at Lebanon to 12 cents at Matson, only one mile further distant, would amount to unjust discrimination in favor of Lebanon and against Matson and provoke complaint and litigation on the part of the citizens of Matson, and said railroad company would be compelled to grade up its rates to said stations so as to prevent such abrupt increases. Affiant is of the opinion that said railroad company would not be able to charge more than 7 cents per hundred pounds to the stations between Matson and Aliceton, inclusive, or more than 8 cents per hundred pounds to the stations between Brumfield and Shelby City inclusive, or more than 9 cents per hundred pounds to the stations between Baughman's Mill and Gilbert, inclusive. Affiant calls particular attention to the figures shown in the column headed amount of reduction indicated; that beginning at Gap in Knob, 16 miles from Louisville, said railroad company would be compelled to make reductions in its existing standard rates, which affiant believes and affirms to be just and reasonable rates from a minimum of 1 cent to a maximum of 7 cents per hundred pounds.

Fifth. Affiant states that said railroad company, in making its rate to and from its country stations such as those at which said distilleries are located, has always endeavored to apply the same rate in both directions on both state and interstate shipments, and that the enforcement of said orders will compel said railroad company to charge on corn, rye, malt and barley, for instance, 6 cents per hundred pounds from Louisville to Gethsemane, while charging 10 cents per hundred pounds from Gethsemane to Louisville; or charging 6 cents from Louisville to Coon Hollow and 10 cents from Coon Hollow to Louisville; of charging 6 cents from Louisville to Chicago, Ky., and 10 cents from Chicago, Ky., to Louisville; of 6 cents from Louisville to Loretto and 11 cents from Loretto to Louisville; of charging 6 cents from Louisville to Lebanon and 12 cents from Lebanon to Louisville. Affiant believes and says that such wide differences between the rates in one direction compared with the rates in the reverse direction would provoke complaint and litigation and said railroad company would inevitably be compelled to make reductions, both its state and interstate rates into Louisville, Covington and Newport corresponding with the reductions made by the rates fixed in said orders from Louisville, Covington and Newport.

Sixth. Affiant states that said railroad company in making its rates to and from its country stations has always endeavored to avoid any distinction between corn, rye, malt, barley, wheat, oats, and other kinds of grain, but to charge the same rates upon any kind of grain, and that the limitation of the distillers' rates on grain to corn, rye, malt and barley was merely because of the fact that those were the only kinds of grain used by said distillers, and it was therefore not necessary to include other kinds. Affiant says that no circumstance or condition exists to justify such widely varying rates

54 on corn, rye, malt, and barley as compared with wheat, oats, and other kinds of grain, and that said orders of said Railroad Commission, if enforced, will compel said railroad company to make reductions in its rates on wheat, oats, and other kinds of grain corresponding with the reductions made by said orders on corn, rye, malt and barley in order to avoid complaint and litigation by the shippers and receivers of wheat, oats and other kind of grain from and to the points specified in said orders and to and from all other points on said railroad company's lines in Kentucky.

Seventh. Affiant states that said railroad company has always endeavored to avoid making any difference between the rates upon carload and less than carload quantities of grain to and from its country stations; that the limiting of said distillers' rates to carload quantities of corn, rye, malt and barley was not an indispensable condition imposed by said railroad company, but resulted from the fact that the grain of said distilleries invariably moved in carload quantities; and affiant states that said orders of said Railroad Commission, if enforced, will require said railroad company to differentiate between carload and less than carload quantities of corn, rye, malt and barley, and thus create an unjust discrimination, as a result of which said railroad company will, in affiant's opinion, be compelled to establish carload and less than carload rates on all kinds of grain between all points in Kentucky.

Eighth. Affiant is familiar with the rates charged by said railroad company and by other railroad companies in the territory south of the Ohio and Potomac rivers and east of the Mississippi River in which lies the greater proportion of said railroad company's lines upon the articles embraced in the orders of said Railroad Commission, and that the rates therein fixed from and to points specified upon said articles and particularly on corn, rye, malt and barley are absurdly, unjustly and unreasonably low and are substantially lower in comparison with the rates charged elsewhere in said territory by said railroad company and by other railroad companies. Affiant states that said rates so fixed on corn, rye, malt and barley are materially lower than existing anywhere in said territory and are materially lower than said Railroad Commission, to-wit, in 1906, declared to be just and reasonable rates for the transportation of such commodities in Kentucky for the same or similar distances upon the lines of the Louisville & Nashville Railroad Co., the Illinois Central Railroad Co., the Southern Railway, the Nashville, Chattanooga & St. Louis Railway Co., and the Cincinnati, New Orleans & Texas Pacific Railway Co.

Affiant further states that the rates so fixed by said Railroad Commission are, in his opinion absurdly, unjustly and unreasonably low in and of themselves, for the service performed, because they are materially less than the rates on the said articles charged by said railroad company in other parts of Kentucky, and said railroad company has not in the past and is not earning now more than a fair and reasonable return from its business in said State of Kentucky. Affiant further states that said rates are absurdly, unjustly

and unreasonably low in and of themselves because they are materially less than would be charged for the same service between the same points or between other points by any existing means of transportation. Affiant further says that said rates are absurdly, unjustly and unreasonably low in and of themselves, because they are measured by the special rates which were given to distillers, whereas said Railroad Commission has given said rates wide and unrestricted application.

Ninth. Affiant states that the rates embraced in said orders have been fixed in absolute disregard of the fact that the laws of both the State of Kentucky and the United States forbid said railroad company to charge more for a long haul than for a short haul over the same line in the same direction, the shorter being included within the longer distances, because the rate fixed in said orders on corn, rye, malt and barley, for instance, from Louisville to Lebanon, a distance of 67 miles is 6 cents whereas the rate from Louisville to Lofty, 61 miles over the same line in the same direction is 11 cents; to Dants, 53 miles 10 cents; to Willow Springs, 51 miles 10 cents; to New Haven, 45 miles, 10 cents; to Lyons, 43 miles 10 cents; to Nelsonville, 39 miles 9 cents and to Boston, 34 miles 9 cents per hundred pounds. Affiant knows of no circumstance or condition by reason of which said railroad company would be justified in charging upon said articles a less rate to any point of destination embraced in said order than to any intermediate station, and says that because of the laws aforesaid the railroad company would, therefore, be compelled to reduce the rates to all of its intermediate stations so as to be not higher than the rates fixed to the points of destination specified in said order, unless relieved therefrom by the order of said Commission and of the Interstate Commerce Commission.

Tenth. Affiant says that the movement of the articles embraced in said orders upon said railroad company's lines in Kentucky is large in volume, and that the reductions in rates that would, in affiant's opinion, inevitably follow the enforcement of said orders would deprive said railroad company of many thousands of dollars of revenue annually, which it would otherwise receive on basis of its existing standard rates which are just and reasonable in all respects, and that such loss will be irrecoverable because said reduced rates will not increase the volume of traffic moving over said railroad company's lines and, therefore, said reduction in rates and loss of revenue will be unaccompanied by any compensating benefits whatsoever to said railroad company, notwithstanding there has been in the last several years a heavy and constantly growing increase in the cost of the service required of said railroad company in transporting said articles.

C. B. COMPTON.

Subscribed and sworn to before me this 24th day of September, 1910.

My Commission expires January 24, 1914.

[SEAL.]

G. W. B. OLMSTEAD,  
Notary Public, Jefferson County, Ky.

56 The affidavit of D. M. Goodwyn, referred to in the foregoing order and filed by complainant on Sept. 26, 1910, is in words and figures as follows, viz:

In the Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Affidavit of D. M. Goodwyn.*

Filed by Complainant in Court, September 26, 1910.

The affiant, D. M. Goodwyn, states that he is fifty-four (54) years old; resides in Louisville, Kentucky, and has been for over nine years General Freight Agent of the Louisville & Nashville Railroad Company, complainant herein; that he has had more than thirty years' experience in the railroad business, having served the Louisville & Nashville Railroad Company nearly sixteen years during that period as chief clerk in the general freight office, as assistant general freight agent and as general freight agent.

Affiant states that he is familiar with the freight rates of said company, and during his employment with it has been directly connected with the making of said freight rates; that, in the performance of his duties, he has been required to investigate, analyze, keep in touch with the many and various conditions surrounding and affecting the freight traffic of the company, and the various cities and communities served by it.

Affiant states that he is familiar with the subject matter of this proceeding, and that, by reason of his experience and employment, he is qualified to testify concerning the same.

Affiant states that, for a long time prior to March 25, 1910, and as far back as 1874, said railroad company made reduced rates to the owners of distilleries located along its lines of railroad in the State of Kentucky for the transportation of their raw materials and supplies, said reduced rates being made for the promotion, encouragement and increase of the manufacture and shipment of whiskey via its lines of railroad; said rates were materially less than the rates charged upon the same articles by said railroad company between the same points of origin and destination, when intended for and devoted to uses other than the manufacture and shipment of whiskey; that said rates were made from season to season, or year to year, without any promise or obligation whatever made by said

57 railroad company to continue said rates beyond the expiration of the season or year; that until January 1, 1899, said special rates were made upon the same general basis, but upon that date said railroad company, because of the depressed conditions surrounding the whiskey trade at that time, made still lower rates for said distillers on their grain; that until the passage, by Congress, of the so-called Hepburn Act, amending the Act to Regulate Commerce, said special rates on distillers' supplies were applied to both interstate and intrastate shipments; that shortly thereafter the Interstate Commerce Commission objected to the application of said special rates upon interstate traffic, whereupon said railroad company cancelled and withdrew said special rates as to all interstate traffic, and thereafter, until March 25, 1910, applied them only to intrastate traffic within the State of Kentucky.

Affiant states that thereupon and thereby the said railroad company was likely to be forced into the attitude of discriminating between intrastate and interstate traffic of the same character, to the same points of destination; that investigation developed that the conditions which had justified the making of said special rates in the beginning no longer existed; that the manufacture of whiskey at points along its line in the State of Kentucky, and shipments therefrom, had become firmly established as a large and profitable business; that whatever reasons had originally prevailed in the establishment of said special rates for the promotion and encouragement of said distilleries no longer existed; that said special rates were not a matter of contract between said distillers, or any of them, and said railroad company, but were made and extended to said distillers as the voluntary act of said railroad company for the reasons aforesaid.

Affiant states that as the conditions which originally governed in the making of said voluntary concessions to said distillers had disappeared and no longer existed, the said rates had become unjustly and unreasonably low and a discrimination against those persons who were paying the higher or standard rates of said railroad company upon said articles, when intended for and devoted to uses other than the manufacture and shipment of whiskey.

Affiant states that the rates charged and collected for the transportation of said articles on and after March 25, 1910, were and are the just and reasonable standard rates of said Louisville & Nashville Railroad Company; that they compare favorably with the rates charged and collected on the remaining portions of its Kentucky lines, and upon its lines in the numerous other States wherein said railroad company operates, and also with the rates charged and collected by other railroad companies for similar transportation in Kentucky and other States where the circumstances are substantially similar.

Affiant states that there was not then, and has not been since, any complaint made against the application of said higher or standard rates on said articles when intended for and devoted to uses

other than the manufacture and shipment of whiskey, but  
58 that, soon after the cancellation and withdrawal of the  
special rates on distillers' supplies, various distillers, who  
have for many years, been beneficiaries thereof, filed a complaint  
with the Railroad Commission of Kentucky against the Louisville  
& Nashville Railroad Company, praying among other things,  
for an order requiring and compelling said railroad company to  
restore said special rates. Affiant is informed and believes that no  
shipper, receiver or user of said articles for purposes other than the  
manufacture and shipment of whiskey was a party to said complaint  
or took any part in the prosecution thereof before said Railroad  
Commission of Kentucky.

Affiant states that on the 10th day of August, 1910, said Railroad  
Commission of Kentucky entered certain orders among other things  
declaring the rates then charged for the transportation of said  
articles (which said rates were the standard rates of the Louisville  
& Nashville Railroad Company, as hereinbefore described to be  
extortionate, unjust and unreasonable, and forbidding said railroad  
company to charge, collect or receive for the transportation of said  
articles rates in excess of those which said railroad company had,  
prior to March 25, 1910, applied to said articles when intended for  
and used in the manufacture and shipment of whiskey. Affiant  
states that said orders were intended to and did have effect of fixing  
rates to be charged by said railroad company for the transportation  
between the points specified therein of the articles named, without  
reference to the uses to which said articles were to be applied by the  
consignees thereof; and of commanding and requiring said railroad  
company to apply the said rates to the shipments of said articles  
made by any and all persons, whether manufacturers and shippers  
of whiskey, or otherwise, and wholly without regard to the uses  
and purposes to which said articles were to be applied by the con-  
signees thereof.

Affiant states that the principal ground for the complaint filed  
before said Railroad Commission of Kentucky against the Louisville  
& Nashville Railroad Company because of the cancellation  
and withdrawal of the special rates on distillers' supplies, was the  
cancellation and withdrawal of the special rates on distillers' grain,  
such as corn, rye, malt and barley; that said orders of said Railroad  
Commission of Kentucky are arbitrary, unreasonable and unjust,  
especially as applied to said grain:

First. Because they are intended to compel said railroad company  
to transport said grain at rates materially less than its said  
standard rates, as demonstrated by the following table:

59	From Louisville, Ky., to—	Distance.	Rates as per	
			Kentucky Railroad Com- mission's order.	L. & N. R. R. Co.'s stand- ard rates.
Chapeze, Ky.	24	miles	5 cents	8 cents
Clermont, Ky.	25	"	5 "	8 "
Hobbs, Ky.	27	"	5 "	8 "
Lotus, Ky.	29	"	5 "	8 "
Deatsville, Ky.	31	"	5 "	8 "
Samuels, Ky.	33	"	5 "	8 "
Hunters, Ky.	36	"	5 "	8 "
Bourbon, Ky.	37	"	5 "	8 "
Nazareth, Ky.	37	"	5 "	8 "
Withrow, Ky.	38	"	5 "	8 "
Bardstown, Ky.	39	"	5 "	8 "
Early Times, Ky.	42	"	5 "	9 "
Greenbrier, Ky.	45	"	5 "	9 "
Athertonville, Ky.	44	"	5 "	9 "
Gethsemane, Ky.	48	"	6 "	10 "
New Hope, Ky.	50	"	6 "	10 "
Willow Springs, Ky.	51	"	6 "	10 "
Coon Hollow, Ky.	52	"	6 "	10 "
Dants, Ky.	53	"	6 "	10 "
Chicago, Ky.	55	"	6 "	10 "
Loretto, Ky.	57	"	6 "	11 "
St. Marys, Ky.	62	"	6 "	11 "
Lebanon, Ky.	67	"	6 "	12 "
Crab Orchard, Ky.	115	"	10 "	15 "
Calvary, Ky.	73	"	9 "	15 "
Campbellsville, Ky.	87	"	11 "	15 "
Eminence, Ky.	40	"	6 "	7 "
Jett, Ky.	71	"	6 "	7 "
Silver Springs, Ky.	88	"	8 "	9 "
Bloomfield, Ky.	57	"	7 "	9 "
Kellers, Ky.	135	"	10 "	13 "
Cynthiana, Ky.	133	"	10 "	13 "
Lair, Ky.	130	"	10 "	13 "
Haden, Ky.	107	"	10 "	13 "
Gilbert, Ky.	110	"	10 "	13 "
Lancaster, Ky.	113	"	10 "	13 "
Silver Creek, Ky.	129	"	10 "	12 "

Second. Because said rates on grain, sought to be established by said Kentucky Railroad Commission, are materially less than the rates prescribed in an order of the Kentucky Railroad Commission made in June, 1906, and as alleged by said Commission at that time to have been fair, just and reasonable; said schedule of rates of June, 1903, having been set aside by the Supreme Court of the United States as being beyond the authority of the Railroad Commission of Kentucky to establish (see table).

60	From Louisville, Ky., to—	Distance.	Rates as per Kentucky Rail- road Commis- sion's order of August 10, 1910.	Rates as per Kentucky Rail- road Commis- sion's order of June, 1906.
	Chapeze, Ky.	24 miles	5 cents	6 cents
	Clermont, Ky.	25 "	5 "	6 "
	Hobbs, Ky.	27 "	5 "	6 "
	Lotus, Ky.	29 "	5 "	6 "
	Deatsville, Ky.	31 "	5 "	6 "
	Samuels, Ky.	33 "	5 "	6 "
	Hunters, Ky.	36 "	5 "	6 "
	Bourbon, Ky.	37 "	5 "	6 "
	Nazareth, Ky.	37 "	5 "	6 "
	Withrow, Ky.	38 "	5 "	6 "
	Bardstown, Ky.	39 "	5 "	6 "
	Early Times, Ky.	42 "	5 "	6 "
	Greenbrier, Ky.	45 "	5 "	6 "
	Athertonville, Ky.	44 "	5 "	6 "
	Gethsemane, Ky.	48 "	6 "	6 "
	New Hope, Ky.	50 "	6 "	6 "
	Willow Springs, Ky.	51 "	6 "	6 "
	Coon Hollow, Ky.	52 "	6 "	6 "
	Dants, Ky.	53 "	6 "	6 "
	Chicago, Ky.	55 "	6 "	6 "
	Loretto, Ky.	57 "	6 "	6 "
	St. Marys, Ky.	62 "	6 "	9 "
	Lebanon, Ky.	67 "	6 "	9 "
	Crab Orchard, Ky.	115 "	10 "	12 "
	Calvary, Ky.	73 "	9 "	10 "
	Campbellsville, Ky.	87 "	11 "	11 "
	Eminence, Ky.	40 "	6 "	7 "
	Jett, Ky.	71 "	6 "	10 "
	Silver Spring, Ky.	88 "	8 "	11 "
	Bloomfield, Ky.	57 "	7 "	8 "
	Kellers, Ky.	135 "	10 "	13 "
	Cynthiana, Ky.	133 "	10 "	13 "
	Lair, Ky.	130 "	10 "	12 "
	Haden, Ky.	107 "	10 "	11 "
	Gilbert, Ky.	110 "	10 "	11 "
	Lancaster, Ky.	113 "	10 "	12 "
	Silver Creek, Ky.	129 "	10 "	12 "

Said Adam T. Siler, one of the defendants in this cause, was a member of said Railroad Commission of Kentucky in June, 1906, making said order, which was set aside, as aforesaid, by the Supreme Court of the United States.

Third. Because said rates on grain, sought to be established by said orders of said Railroad Commission of Kentucky, are materially lower than the rates on grain for similar distances in the State of Kentucky charged by lines other than the Louisville & Nashville Railroad Company, and materially lower than the rates on grain for similar distances charged in the States of Tennessee, Alabama and Mississippi, by lines other than the Louisville & Nashville Railroad Company, against which said higher rates in Kentucky, Tennessee, Alabama and Mississippi, charged by said lines other than the Louisville & Nashville Railroad Company there has been no protest or complaint, so far as this affiant is informed and believes.

61 Fourth. Because said rates on grain sought to be established by said orders of said Railroad Commission of Kentucky are as low as, and, in many cases lower than, the rates charged on

grain in the States of Indiana and Ohio, where grain is produced in very large quantities, forming a considerable percentage of the tonnage of the railroads in said States, and where the density of population and of tonnage is materially greater than in the State of Kentucky.

Fifth. Because the said orders, in seeking to compel said railroad company to apply on said articles between the points specified therein, rates which are materially less than applied thereto between other points in the State, will, if enforced, compel said railroad company to unjustly discriminate between different sections of the State, or else to apply the said rates, without distinction or discrimination, between all points on its lines in the State.

Sixth. Because the said orders seek to compel said railroad company to apply the said rates to the traffic in said articles for any and all persons shipping from and to the points specified, notwithstanding the fact that as between the said railroad company and the shippers, receivers and users of said articles for purposes other than the manufacture and shipment of whiskey, there is a complete absence of the conditions and considerations which induced said railroad company voluntarily to give said special rates in the beginning.

Seventh. Because the said orders, if enforced, will compel said railroad company to unjustly discriminate in favor of points on its lines in the State of Kentucky and against points on its lines in other States, or else to apply the said rates, without distinction or discrimination, between all points on its lines in all the States in which said railroad company operates, thus practically enabling said Railroad Commission of Kentucky to make the interstate rates of the Louisville & Nashville Railroad Company.

Eighth. Because said orders, if enforced, will compel said railroad company to charge less for a long haul than for a shorter haul over the same line in the same direction, in contravention of the laws of the State of Kentucky and of the United States, or else to apply said rates as maxima between all intermediate points upon interstate as well as intrastate traffic, unless relieved therefrom by the further order of said Commission and the order of the Interstate Commerce Commission.

Ninth. Because said orders, if enforced, will compel said railroad company to accept in other States, as well as in the State of Kentucky, and upon interstate, as well as intrastate traffic, rates which are unjustly, unjustly and unreasonably low in and of themselves, and relatively, and which will not yield the said railroad company fair and reasonable compensation for the service performed, and will deprive said railroad company of the fair and reasonable return which it is entitled to earn upon the property it devotes to the public use in other States, as well as in the State of Kentucky, and upon interstate, as well as upon intrastate traffic.

Tenth. Because said orders, if enforced, will inflict upon said railroad company a considerable loss of revenue and income, in other States, as well as in Kentucky, on traffic handled to and from points not occupied by the distilling interests, and

in connection with the movement of traffic as to which there has been no complaint whatever about the rate; that said orders, if enforced, will result in the establishment of unreasonable, unfair, and unjust rates upon said railroad company's lines in Kentucky, as well as in other States.

D. M. GOODWYN.

Subscribed and sworn to before me, a Notary Public, in and for the County of Jefferson, State of Kentucky, this 23rd day of September, 1910.

[SEAL.]

G. W. B. OLMSTEAD,  
*Notary Public, Jefferson County, Ky.*

My commission expires on the 24th day of January, 1914.

The affidavit of Defendant, Adam T. Siler, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Affidavit of Defendant Adam T. Siler.*

Filed by Defendants in Court September 26, 1910.

The affiant, A. T. Siler, states that he is a member of the Kentucky Railroad Commission, and as such is one of the defendants in this cause, and that he has been a member of said Commission for several years last past and is now the chairman of said Commission. This affiant further states that the orders of said Commission complained of herein were made upon a formal complaint filed by certain persons and companies operating distilleries on the line of plaintiff's road and after the filing of answer by plaintiff herein, the defendant in said complaint, and after defendant upon due notice as to the time and place of hearing was fully heard as to the reasonableness of the rates of which complaint was made and as to the reasonableness of the rates of which complaint is now made. Affiant states that he and the other members of said Commission carefully considered the testimony of numerous witnesses introduced by the parties, which was all the evidence offered, and that defendant being represented by counsel was permitted to fully cross-examine the witness introduced by the complain-

ants. Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force only a short time and that prior to the time those rates were put in force plaintiff had for a number of years been collecting from the complainants no greater rates than those fixed by the orders herein complained of. Affiant further states that the preponderance of evidence showed that the said complainants were the only persons who shipped over plaintiff's line to and from the several points in question the commodities to which said rates apply excepting only a very small quantity of said commodities shipped by other persons at some of said points, and that at some of said points the complainant, operating a distillery at that point, was shown by uncontradicted evidence to be the only shipper of said commodities, while in no case did it appear that said commodities shipped to or from the point at which the distillery plant of any of the complainants was located, other than that shipped by such complainant, was considerable in quantity or value, or amounted to enough to affect the revenue of plaintiff herein to any appreciable extent, or compared in quantity to the quantity shipped or received by the complainant whose distillery was located at said point. Affiant further states that the evidence did not show that the conditions which existed at the time of the hearing of said complaint differed from the conditions which existed during the years when plaintiff voluntarily charged and collected from the complainants the rates fixed by said Commission of which plaintiff is now complaining. Affiant further states that he and his co-defendants carefully considered all the evidence, and in good faith believed and now believe that it showed that the rates then charged by the plaintiff were extortionate, and that the rates fixed by the Commission were then and are now just and reasonable rates. Affiant further states that said Commission has never threatened to institute any criminal prosecution against plaintiff herein for a violation of either of the orders complained of herein, and that he has never made any such threat and that he does not believe that any member of said Commission has ever done so. Affiant further states that it is not his purpose or intention as a member of said Commission to take any step whatever looking to the criminal prosecution of plaintiff for a violation of either of said orders, or to recommend an indictment for a violation of said orders, unless plaintiff should continue to violate said orders after their validity has been determined by some competent court. Affiant further states that he is advised and believes that the statutes of Kentucky afford ample opportunity to test the validity of said orders in the civil courts, and that it is his purpose and he believes that it is the purpose of his co-defendants and of said Commission to test the validity of said statute in the civil courts. Affiant further states that he is advised and believes that all violations of any order of said Commission fixing rates prior to the first conviction for a violation of said order constitute but a single offense, and that as a member of said Commission it is his purpose and intention to insist upon that construction of the statute.

64 Affiant further states that the plaintiff herein did not by its answer filed to said complaint deny that the several amounts

for which reparation was asked represented the amounts collected by plaintiff in excess of the rates which were for many years collected by plaintiff, and which were finally found by said Commission to be just and reasonable rates.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler, this -- day of September, 1910.

My commission expires Feb. 4, 1912.

[SEAL.]

LOUISE B. SORG,  
*Notary Public in and for Franklin County, Kentucky.*

The affidavit of Lawrence B. Finn, Defendant, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:—

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Affidavit of Defendant Lawrence B. Finn.*

Filed by Defendants in Court, September 26, 1910.

The affiant, Lawrence B. Finn, states that he is a member of the Kentucky Railroad Commission and as such is one of the defendants in this cause, and that he was a member of said Commission when the orders complained of herein were filed. This affiant further states that said orders of said Commission were made upon a formal complaint filed by certain persons and companies operating distilleries on the line of plaintiff's road, and after the filing of answer by plaintiff herein, the defendant in said complaint, and after defendant upon due notice as to the time and place of hearing was fully heard as to the reasonableness of the rates of which complaint was made and as to the reasonableness of the rates of which complaint is now made. Affiant states that he and the other members of said Commission carefully considered the testimony of numerous witnesses introduced by the parties, which was all the evidence offered, and that defendant being represented by counsel was permitted to fully cross-examine the witness introduced by the complainants. Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force only a short time and that prior to the time those rates were put in force plaintiff

had for a number of years been collecting from the complainants no greater rates than those fixed by the orders herein complained of. Affiant further states that the preponderance of the evidence showed that the said complainants were the only persons who shipped over plaintiff's line to and from the several points in question the commodities to which said rates apply excepting only a very small quantity of said commodities shipped by other persons at some of said points, and that at some of said points the complainant, operating a distillery at that point, was shown by uncontradicted evidence to be the only shipper of said commodities, while in no case did it appear that said commodities shipped to or from the point at which the distillery plant of any of the complainants was located, other than that shipped by such complainant, was considerable in quantity or value, or amounted to enough to affect the revenue of plaintiff herein to any appreciable extent, or compared in quantity to the quantity shipped or received by the complainant whose distillery was located at said point. Affiant further states that the evidence did not show that the conditions which existed at the time of the hearing of said complaint differed from the conditions which existed during the years when plaintiff voluntarily charged and collected from the complainants the rates fixed by said Commission of which complainant is now complaining. Affiant further states that he and his co-defendants carefully considered all the evidence, and in good faith believed and now believe that it showed that the rates then charged by the plaintiff were extortionate, and that the rates fixed by the Commission were then and are now just and reasonable rates. Affiant further states that said Commission has never threatened to institute any criminal prosecution against plaintiff herein for a violation of either of the orders complained of herein, and that he has never made any such threat and that he does not believe that any member of said Commission has ever done so. Affiant further states that it is not his purpose or intention as a member of said Commission to take any step whatever looking to the criminal prosecution of plaintiff for a violation of either of said orders, or to recommend an indictment for a violation of said orders, unless plaintiff should continue to violate said orders after their validity has been determined by some competent court. Affiant further states that he is advised and believes that the statutes of Kentucky afford ample opportunity to test the validity of said orders in the civil courts, and that it is his purpose and he believes that it is the purpose of his co-defendants and of said Commission to test the validity of said statute in the civil courts. Affiant further states that he is advised and believes that all violations of any order of said Commission fixing rates prior to the first conviction for a violation of said order constitute but a single offense, and that as a member of said Commission it is his purpose and intention to insist upon that construction of the

statute. Affiant further states that the plaintiff herein did 66 not by its answer filed to said complaint deny that the several amounts for which reparation was asked represented the amounts collected by plaintiff in excess of the rates which were for

many years collected by plaintiff, and which were finally found by said Commission to be just and reasonable rates.

LAWRENCE B. FINN,  
*R. R. Com., First Ky. Dis.*

Subscribed and sworn to before me by Lawrence B. Finn, this 26th day of September, 1910. My commission expires February 4, 1912.

[SEAL.]

LOUISE B. SORG,  
*Notary Public in and for Franklin County, Kentucky.*

The affidavit of W. A. Miller, referred to in the foregoing order and filed by defendants on Sept. 26, 1910, is in words and figures as follows, viz:—

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Affidavit of W. A. Miller.*

Filed by Defendants in Court, September 26, 1910.

Affiant, W. A. Miller, says that he is Vice-President of Wright & Taylor, a corporation that was one of the complainants before the Kentucky Railroad Commission in the case of Greenbrier Distillery Company v. Louisville & Nashville Railroad Company in which case said Commission, after hearing evidence and arguments, entered certain orders on August 10, 1910, which orders are sought to be enjoined in this proceeding.

Affiant says that the rates as fixed by said Commission, by the orders aforesaid, had for many years prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in said orders to and from distilleries located at the points named in said orders; that there has not been in the past nor is there now any movement or shipments of the commodities named in said orders between said points other than the shipment of said commodities to and from the distilleries located at said points sufficient in quantity for the rates thereon to materially affect the revenue of the said Louisville & Nashville Railroad Company derived from the transportation of said commodities between said points.

Affiant says that if the Louisville & Nashville Railroad Company

67 is permitted to continue in effect the increased rates between the points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers that all of the distillers located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned and that the value of all of said distilleries will be largely depreciated.

W. A. MILLER.

Subscribed and sworn to before me in Louisville, Jefferson County, Kentucky, by W. A. Miller, this 24th day of September, 1910. My Commission expires January 24, 1914.

[SEAL.]

J. V. NORMAN,  
*Notary Public in and for Jefferson County, Kentucky.*

The affidavit of R. H. Edelen, referred to in the foregoing order and filed by defendants on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Affidavit of R. H. Edelen.*

Filed by Defendants in Court September 26, 1910.

Affiant, R. H. Edelen, says that he is President of the Mattingly & Moore Distillery Company, a corporation that was one of the complainants before the Kentucky Railroad Commission in the case of Greenbrier Distillery Company v. Louisville & Nashville Railroad Company in which case said Commission, after hearing evidence and arguments, entered certain orders on August 10, 1910, which orders are sought to be enjoined in this proceeding.

Affiant says that the rates as fixed by said Commission, by the orders aforesaid, had for many years prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in said orders to and from distilleries located at the points named in said orders; that there has not been in the past nor is there now any movement or shipments of the commodities named in said orders between said points other than the shipment of said commodities to and

68 from the distilleries located at said points sufficient in quantity for the rates thereon to materially affect the revenue of the said Louisville & Nashville Railroad Company derived from the transportation of said commodities between said points.

Afliant says that if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers that all of the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned and that the value of all of said distilleries will be largely depreciated.

R. H. EDELEN.

Subscribed and sworn to before me in Louisville, Jefferson County, Kentucky, by R. H. Edelen this 24th day of September, 1910. My Commission expires January 24, 1914.

[SEAL.]

J. V. NORMAN,  
*Notary Public in and for Jefferson  
County, Kentucky.*

The Demurrer of defendants to whole Bill, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Demurrer to Whole Bill.*

Filed by Defendants in Court September 26, 1910.

The Joint and Several Demurrer of Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Above Named Defendants, to the Bill of Complaint of Louisville & Nashville Railroad Company, the Above Named Complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set

forth and alleged, do demur thereto, and for cause of demurrer show:

69 1. That it appears by plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants.

2. That said bill of complaint of the complainant is wholly without equity.

3. That it appears by said bill that the same is exhibited by the said complainant against these defendants for several distinct matters and causes, and that said bill is multifarious.

4. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said bill.

Wherefore these defendants respectively demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAS. BREATHITT,

*Atty Gen'l;*

JNO. F. LOCKETT,

*Ass't Atty Gen'l;*

McCHORD, HINES & NORMAN,

*Attorneys for Defendants.*

Adam T. Siler makes solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 26th day of September, 1910.

My Commission expires February 4, 1912.

[SEAL.]

LOUISE B. SORG,

*Notary Public in and for Franklin County, Kentucky.*

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

JNO. F. LOCKETT,

*Of Counsel for Defendants.*

The Demurrer of defendants to part of Bill, referred to in the foregoing order and filed on Sept. 26, 1910, is in words and figures as follows, viz:

70 Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,

vs.

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Demurrer to Part of Bill.*

Filed by Defendants in Court September 26, 1910.

The Joint and Several Demurrer of Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, Above Named Defendants, to a Part of the Bill of Complaint of Louisville & Nashville Railroad Company, the Above Named Complainant.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur to so much and such part of the bill as seeks that these defendants may answer and set forth whether a certain order of the Kentucky Railroad Commission made on August 10, 1910, awarding reparation to the Greenbrier Distillery Company and certain other persons and companies on account of extortionate freight charges shall be put into effect and enforced, and to so much and such part of said bill as prays for an injunction restraining these defendants from putting said order into effect, and shows:

1. That it appears by the complainant's own showing by the said bill that it is not entitled to any relief on account of the matters set up in said part of said bill, and especially is not entitled to the said relief prayed for.
2. That said part of said bill is wholly without equity.
3. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said part of said bill.

Wherefore and for divers other errors and imperfections appearing in the said bill, these defendants humbly pray the judgment of this Honorable Court whether they shall be compelled to make any answer to such part of said bill as is so demurred unto as aforesaid, these defendants being unable by reason of the fact that the bill intermingles its several complaints to more specifically set out the parts of the bill to which this demurrer relates.

JAMES BREATHITT,

*Atty Gen'l of Ky.,*

JNO. F. LOCKETT,

*Asst Atty Gen'l of Ky.,*

McCHORD, HINES & NORMAN,

*Counsel for Defendants.*

71 Adam T. Siler makes solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

ADAM T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 26th day of September, 1910.

My commission expires February 4, 1912.

[SEAL.]

LOUISE B. SORG,  
*Notary Public in and for Franklin County, Kentucky.*

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

JNO. F. LOCKETT,  
*Of Counsel for Defendants.*

On a day following, to wit: on the 3rd day of November, A. D., 1910, an order was made and entered in said cause, which said order is in words and figures as follows, viz:—

United States Circuit Court, Eastern District of Kentucky, Frankfort Division.

THURSDAY, November 3rd, A. D. 1910.

Court met pursuant to adjournment:

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

ADAM T. SILER et al., Defendants.

This cause coming on to be heard on the demurrs of the defendants to the bill of complainant and the application of the complainant for an interlocutory injunction against the defendants, and it appearing to the court that notice of this hearing has been given for more than five days to the governor and to the attorney general of the State of Kentucky, and to the defendants in this cause, and so admitted by counsel for both complainant and defendants in open court:

Came the complainant by Albert S. Brandeis and H. L. Stone, its attorneys, and defendants by McChord and Hines and John F. Lockett, their attorneys, and the said John F. Lockett also appearing as assistant attorney general for the attorney general.

Whereupon, complainant by attorneys, tendered and offered to file an amended bill of complaint herein, which is now ordered filed, and on motion of defendants, consented to by complainant, the defendants are hereby allowed to amend their demurrers so as — conform to the bill of complaint as amended, and same are hereby ordered filed.

Whereupon, the demurrers of defendants to the bill of complaint as amended, and the motion of complainant for an interlocutory injunction herein, were argued by counsel, and are now submitted, and the court not being fully advised, takes time.

On motion of parties, both complainant and defendants, they are given time until and including November 25th next, to prepare and file briefs herein.

Said Amended Bill of Complaint, referred to in the foregoing order and filed on the 3rd day of November A. D., 1910, is in words and figures as follows, viz:—

In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.  
ADAM T. SILER et al., Defendants.

*Amended Bill of Complaint.*

Filed in Court November 3, 1910.

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, the Louisville & Nashville Railroad Company, brings this, its amended bill of complaint, against Adam T. Siler, Lawrence B. Finn and Lew P. Tarlton, constituting the Railroad Commission of the State of Kentucky, defendants, and thereupon states:

XVIII.

That, including the lines of railroad owned and operated by it, as stated in its original bill of complaint herein, it owned and operated on August 10, 1910, and now owns and operates the following lines of railroad, situated in fifty-seven (57) counties in the State of Kentucky, to-wit:

*Mileage in Kentucky.*

From—	To—	Mileage
1-a		
L. & N.—Main stem,.....	Louisville, Ky. ....	129.91
Lebanon Branch .....	Lebanon Jct., Ky. ....	107.28
Cumberland Valley Division .....	Corbin, Ky. ....	46.94
*Cincinnati Division .....	Louisville, Ky. ....	100.63
*Cincinnati Division .....	E. Louisville, Ky. ....	4.15
A. Street Connection .....	Transfer Jct., Ky. ....	76
Memphis Line .....	Memphis Jct., Ky. ....	46.46
Henderson Division .....	State Line, Ky.-Tenn. ....	98.23
Knoxville Division .....	Corbin, Ky. ....	30.03
Kentucky Division .....	Covington, Ky. ....	185.07
Louisville & Atlantic Rd. ....	Versailles, Ky. ....	101.10
	Beautyville Jct., Ky. ....	869.56
1-b		
Chesapeake & Nashville Branch,.....	State Line, Ky.-Tenn. ....	10.08
Greensburg Branch .....	C. & O. Jct., Ky. ....	30.90
Bardstown & Springfield Branch .....	Bardstown Jct., Ky. ....	37.44
Knoxville Division branches,.....	Wilton Jct., Ky. ....	3.97
	Saxton, Ky. ....	3.19
	Jellico, Tenn.-Ky. ....	8.11
	Maxie, Ky. ....	1.78
Cumberland Valley Division branches,.....	Orby, Ky. ....	17.13
Middlesboro Rd. ....	Wenrich, Ky. ....	2.01
	Middlesboro, Ky. ....	5.23
	Stony Fork Jct., Ky. ....	6.08
	Logmont, Ky. ....	2.87
Clarksville & Princeton Branch,.....	State Line, Ky.-Tenn. ....	23.17
Cincinnati Division Branch .....	Louisville, Ky. ....	3.46
Lexington Branch .....	La Grange, Ky. ....	67.00
Shelby Branch .....	Shelbyville, Ky. ....	8.51
Bloomfield Branch .....	Anchorage, Ky. ....	18.58
Kentucky Division Branch .....	Shelbyville, Ky. ....	26.72
Moreland Branch .....	Bloomfield, Ky. ....	30.47
	Rowland, Ky. ....	16.10
	Madisonville, Ky. ....	

1	Louisville & Atlantic R. Ry.,.....	Heidelberg, Ky.,.....	3.00
	Frankfort & Cincinnati Ry.,.....	Frankfort, Ky.,.....	40.10
<b>2</b>	<b>Morganfield &amp; Atlanta Rd.,.....</b>	<b>Providence, Ky.,.....</b>	<b>25.33</b>
	<b>Maysville &amp; Lexington Ry.—N. Division,.....</b>	<b>Maysville, Ky.,.....</b>	<b>49.48</b>
	<b>Maysville &amp; Lexington Ry.—S. Division,.....</b>	<b>Paris, Ky.,.....</b>	<b>17.86</b>
	<b>Owensboro &amp; Nashville Ry.,.....</b>	<b>Owensboro, Ky.,.....</b>	<b>83.46</b>
	<b>Pine Mountain Rd. East,.....</b>	<b>Yingling, Ky.,.....</b>	<b>2.14</b>
	<b>Savoy, Ky.,.....</b>	<b>Savoy, Ky.,.....</b>	<b>18.60</b>
	<b>Nevisdale, Ky.,.....</b>	<b>Nevisdale, Ky.,.....</b>	<b>2.49</b>
	<b>Central Transfer Ry. &amp; Storage Co.,.....</b>	<b>In city of Louisville, Ky.,.....</b>	<b>55.49</b>
	<b>Millisonville, Hartford &amp; Eastern Rd.,.....</b>	<b>Elkhorn, Ky.,.....</b>	<b>55.49</b>
	<b>Reinecke Jet. Ry.,.....</b>	<b>Elkhorn, Ky.,.....</b>	<b>254.86</b>
<b>3</b>	<b>Glasgow Ry.,.....</b>	<b>Glasgow Jet. Ry.,.....</b>	<b>10.50</b>
	<b>Elkton &amp; Guthrie Rd.,.....</b>	<b>Elkton, Ky.,.....</b>	<b>10.92</b>
			<b>21.42</b>
<b>4</b>	<b>Southern Ry.,.....</b>	<b>State Line, Tenn.-Ky.,.....</b>	<b>*</b>
	<b>Louisville &amp; Interurban Ry.,.....</b>	<b>State Line Ave., Ky.,.....</b>	<b>2.09</b>
	<b>Cov. &amp; Cliff Elec. Rd. &amp; Trfr. &amp; Brg. Co.,.....</b>	<b>State Line, Ky.-Ohio</b>	<b>7.70</b>
	<b>Providence Coal Co.,.....</b>	<b>Tracks at Providence, Ky.,.....</b>	<b>1.58</b>
	<b>L. H. &amp; St. L. Ry.,.....</b>	<b>Tracks at Owensboro, Ky.,.....</b>	<b>.30</b>
	<b>Chesapeake &amp; Ohio Ry.,.....</b>	<b>Tracks at Lexington, Ky.,.....</b>	<b>.26</b>
	<b>Lexington Union Station Co.,.....</b>	<b>Tracks at Lexington, Ky.,.....</b>	<b>.20</b>
	<b>Straight Creek Coal &amp; Coke Co.,.....</b>	<b>Straight Creek, Ky.,.....</b>	<b>.22</b>
			<b>3.89</b>
			<b>16.24</b>
		<b>Total,.....</b>	<b>1,527.97</b>

\* Includes Newport & Cincinnati Bridge in Kentucky,.....

† Includes Henderson Bridge in Kentucky,.....

† 0.67 miles in length operated as side track; owned jointly with Southern Railway Company.

75 Complainant states that the average total mileage of the railroad lines owned and operated by it during the year ended June 30, 1910, in Kentucky and other States and on August 10, 1910, was and is now..... 4,590.55

### XIX.

Complainant further states that by its charter granted by the Legislature of Kentucky, entitled "An Act to Charter Louisville & Nashville Railroad Company," approved March 5, 1850, and the amendments thereto, it was and is authorized and empowered to charge and collect, for the transportation of goods, merchandise, and property of any kind whatever on or over its railroad lines in Kentucky, any sum not exceeding the following rates, to-wit:

For every one hundred pounds transported over twenty miles and under fifty miles three and one-half (3½) mills for each mile; for all other transportation of freight and property, not exceeding four (4) mills for each mile per hundred pounds; for transporting single packages any distance weighing not less than one hundred pounds, twenty-five (25) cents; for transporting live stock, poultry, furniture, feathers, wool rags, and other like light bulky articles, weighing not more than sixty-five (65) pounds to the cubic foot, not exceeding fifteen (15) per cent above the rates allowed to be charged for heavy merchandise. Gold, silver, bullion, money of all kinds, and mails are exempted from the rates established in its said charter, and complainant's board of directors is thereby authorized to contract especially therefor. For the transportation of passengers complainant is authorized by its charter to charge not exceeding four (4) cents per mile for each passenger with his baggage weighing not more than forty (40) pounds.

The said maximum rates which complainant is authorized and empowered to charge and collect for its transportation services on and over its lines in Kentucky are set out, in part in Section eighteen (18) of its said original charter from the Legislature of Kentucky, and, in so far as they are not set out in that section, complainant is authorized and empowered by and expressly referred to in that section to charge and collect the same maximum rates as were, at the date of the passage and approval of its said original charter, authorized to be charged and collected by and on the railroad from Lexington to Frankfort, Kentucky, which maximum rates were on March 5, 1850, set out in Section Twenty (20) of the act of the Legislature of Kentucky, entitled "An act to incorporate the Lexington & Frankfort Railroad Company," approved February 28, 1848, and said maximum rates so provided for in Section Twenty (20) of the last mentioned act referred to and made part of complainant's said original charter, were in full force and effect, and charged and collected, upon said Lexington & Frankfort Railroad at the date of the passage and approval of complainant's said original charter on March 5, 1850, and complainant's charter authority, powers, grants, rights and privileges to charge and collect said maximum rates for its transportation lines in Kentucky have been ever since and are now in full force and effect.

76 Complainant states that by reason of these provisions in its charter there was a valid contract made, which still subsists between the Commonwealth of Kentucky and complainant, whereby complainant was and is authorized and granted the right and privilege to charge and collect from its patrons, on and over the lines of railroad it owns and operates in Kentucky, rates for the transportation of goods, wares, merchandise, property and freight and passengers, respectively, not exceeding the maximum rates hereinabove set out and provided in its said original charter and the amendments thereto.

Complainant states that all the lines of railroad owned and operated by it, as set forth in Paragraph III of its original bill of complaint and Paragraph XVIII of this, its amended bill of complaint, were constructed and acquired by complainant upon the faith of said contract embodied in the charter provisions aforesaid, which have never been repealed by any act, public or private, of the General Assembly of the Commonwealth of Kentucky.

The complainant states while it is true that by a resolution of its Board of Directors, adopted July 11, 1902, complainant duly accepted the provisions of the present Constitution of the Commonwealth of Kentucky, ordained September 28, 1891, and the provisions of Chapter 32 of the Kentucky Statutes, being the Act adopted April 5, 1893, with the amendments thereto, a copy of which resolution was filed with the Secretary of the State of Kentucky, and thereby and thereafter the said contract (with respect to the maximum freight and passenger rates it is entitled to charge and collect on its said lines of railroad) between complainant and the Commonwealth of Kentucky became and is now no longer irrevocable or irrepealable, nevertheless, said contract remains intact and has never been revoked or repealed by any act of the Legislature of the State of Kentucky, and the obligation thereof was on August 10, 1910, the date of the making by the defendants of the orders herein complained of and is still unimpaired and in full force and effect and beyond the power of the defendants constituting the Railroad Commission of Kentucky to set aside, annul or impair in any manner.

Complainant states that the rates it had in force and effect on the commodities between the points described in its original bill, effective on and after March 25, 1910, which defendants held to be extortionate, and prescribed the rates complained of in lieu thereof, were less than the said maximum rates it was and is allowed by its charter to charge and collect as legal, just and reasonable for the transportation services performed, or to be performed, and, therefore, said order of the defendants, constituting said Commission, is null and void, and operates to deprive complainant of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Complainant further states that it has never charged or collected on any of the lines of railroad it owned or operated in Kentucky, for the transportation of freight, any rate or rates in excess of the

minimum rates prescribed, allowed and authorized by its charter as aforesaid.

77 The complainant further avers that the defendants claim that the Act of March 10, 1900, known as the McChord Act, confers upon them as the Railroad Commission of Kentucky power and authority to declare the rates of complainant for the transportation of freight on and over its lines in said State extortionate, although they do not exceed the maximum rates provided for in its charter, and notwithstanding its charter, in that respect, has not been repealed, and also power and authority to prescribe lower rates in lieu thereof, and to subject complainant and its officers, agents, and employees to criminal prosecution and heavy, repeated, and cumulative penalties for charging, collecting or receiving a greater or higher rate, toll or compensation for like services thereafter rendered than that made or fixed by the defendants, constituting said Commission.

The complainant states that said McChord Act so construed and the orders of August 10, 1910, made by the defendants, as such Commission, in pursuance thereof, and herein complained of impair the obligation of the contract made and existing between complainant and the State of Kentucky, whereby complainant is entitled to charge, collect and receive rates on freight in said State not in excess of the maximum rates aforesaid upon the same kind of commodities, transported for the same distances stated in its charter, so long as said contract is not revoked and its said charter provision remains, as it does, unrepealed, by the Legislature of said State, which impairment is in violation of that provision of Sub-section one (1), Section ten (10), Article one (1) of the Constitution of the United States, which declares "no State shall pass any law impairing the obligation of contracts."

## XX.

Complainant further states that the maximum rates prescribed by the order made by the defendants, constituting the Railroad Commission of Kentucky, of August 10, 1910, herein complained of, upon corn, rye, malt, barley and other articles used in the manufacture and shipment of whiskey on and over complainant's lines from Louisville, Covington, and Newport, Kentucky, respectively, to the sixteen stations, respectively named and set out in said order, are arbitrary, unjust, unreasonable, discriminatory and illegal because of the following facts, among other grounds, to-wit:

1. The defendants by their said order seek to compel the complainant to perpetuate and make permanent the special rates put in temporarily by complainant from season to season upon said commodities to be used as and for the purposes aforesaid from three points, respectively, to the sixteen points, respectively, named in said order, notwithstanding the conditions in consideration of which complainant therefore granted said exceptional rates in the beginning had disappeared and ceased to exist long prior to March 25, 1910.

2. The defendants, by their said order, seek to compel complainant to apply the said low and unremunerative rates put in for said special purposes to the traffic in said commodities of any and all persons shipping from Louisville, Covington, and Newport,

78 respectively, to the points named in said order, respectively,

thus giving to said special rates a much broader application than was ever voluntarily given thereto by complainant, notwithstanding the fact that as between complainant and the shippers, receivers and users of said articles of freight for other purposes than the manufacture and shipment of whiskey there was and is a complete absence of the conditions and considerations, which induced complainant to voluntarily grant said special rates in the beginning and afterward to continue them in effect from season to season.

3. The said special rates upon said commodities and articles, from the three points, respectively, to the sixteen points, respectively, named in said order, are materially less than are applied thereto between other points on complainant's lines in Kentucky, and if enforced, would make an unjust discrimination between different sections of the State, or else compel the application of said special and low rates, without distinction or discrimination, to the transportation of said commodities and articles between all points on its lines in the State of Kentucky.

4. The enforcement of the rates prescribed in said order will bring about a discrimination in favor of intrastate traffic and against interstate traffic of the same character originating at points in other States and transported between the same points in Kentucky, thus placing a burden on interstate commerce, or else to apply the said rates without distinction or discrimination, to both intrastate and interstate traffic between all points in said State.

5. The said order, if enforced, will compel complainant to charge materially less rates in one direction than in the other direction between the same points, on both intrastate and interstate traffic of the same kind, or else to apply said specially low rates, without distinction or discrimination, in both directions between all points.

6. The said order, if enforced, will require complainant to charge less rates upon corn, rye, malt, and barley than upon wheat, oats, and other kinds of grain, whereas complainant has always endeavored to charge and collect the same rates upon all kinds of grain, or else complainant will be compelled to apply the rates specified in said order to all kinds of grain upon both intrastate and interstate shipments.

7. If enforced, said order will compel complainant to charge and collect less rates per 100 pounds upon carload quantities than less than carload quantities of grain, whereas complainant has always endeavored to charge and collect the same rate upon carload as upon less than carload quantities of grain or else complainant will be compelled to establish less rates for carload than for less than carload quantities of grain upon both intrastate and interstate traffic.

8. The enforcement of said order will compel complainant to accept upon interstate as well as intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and

79 relatively, and which will not yield to complainant a fair or reasonable compensation for the service performed, and will deprive complainant without due process of law of the fair and reasonable return, to which it is entitled to earn upon the value of the property it devotes to said service or the public use, with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The enforcement of the rates fixed by said order would compel complainant to charge and receive a less rate or compensation for the transportation of property of like kind, both intrastate and interstate traffic, for a longer haul than for a shorter haul over the same line in the same direction, the shorter being included within the longer distance, in contravention of the laws of the State of Kentucky and the laws of the United States, unless relieved therefrom by the further order of the Railroad Commission of said State, and the order of the Interstate Commerce Commission.

10. The enforcement of the rates prescribed by said order will inflict upon complainant a direct annual loss of revenue and income to at least the extent of the sums stated in its original bill of complaint, upon the transportation of both intrastate and interstate traffic in Kentucky, and a loss many times larger as the necessary result and consequence of being compelled to put into force and effect the rates in accordance with said order on the commodities between the points named therein, and between other points on its lines in Kentucky, with no compensating benefits whatsoever, and in the face of the fact that there has been in the last few years a very heavy increase in the cost of labor, materials, supplies, and every other element or factor entering into the expenses of operating complainant's lines of railroad in, as well as out, of the State of Kentucky.

Wherefore, the complainant prays as in its original bill of complaint, and for all other relief to which it in equity may appear to be entitled.

ALBERT S. BRANDEIS,  
WILLIAM G. DEARING,  
HENRY L. STONE,  
*Attorneys for Complainant.*

STATE OF KENTUCKY,  
*Jefferson County:*

Personally appeared before me, G. W. B. Olmstead, a notary public, duly commissioned, qualified and acting in and for the county and State aforesaid, A. R. Smith, who, being duly sworn by me, deposes and says:

That he is the Third Vice President of the Louisville & Nashville Railroad Company, the complainant in the foregoing bill, and knows the contents thereof; that the facts therein stated as of complainant's own knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

A. R. SMITH.

Subscribed and sworn to before me this 2nd day of November, A. D. 1910.

80 In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky. My commission expires on the 24th day of January, A. D. 1914.

[SEAL.]

G. W. B. OLMSTEAD,  
*Notary Public, Jefferson County, Ky.*

Said Demurrer to whole Bill as Amended, referred to in the foregoing order and filed on the 3rd day of November, A. D. 1910, is in words and figures as follows, viz:

Circuit Court of the United States, Sixth Circuit, for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant.

vs.

ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Demurrer to Whole Bill as Amended.*

Filed in Court November 3, 1910.

The joint and several demurrer of Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky, above named defendants, to the bill of complaint of Louisville & Nashville Railroad Company, the above named complainant, as amended by complainant's amended bill filed herein on the 3rd day of November, 1910.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

1. That it appears by plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants.

2. That said bill of complaint of the complainant is wholly without equity.

3. That complainant has an adequate remedy at law.

4. That it appears by said bill that the same is exhibited by the said complainant against these defendants for several distinct matters and causes, and that said bill is multifarious.

5. That it appears from said bill of complaint that this court has no jurisdiction to hear and determine the matters set up in said bill.

Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any

81 further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

JAMES BREATHITT, *Att'y Gen'l;*  
JOHN F. LOCKETT, *JR.,*

McCHORD, HINES & NORMAN,  
*Attorneys for Defendants.*

Adam T. Siler makes a solemn oath and says that he is one of the above named defendants, and that he is Chairman of the Railroad Commission of Kentucky, and that the foregoing demurrer is not interposed for delay.

A. T. SILER.

Subscribed and sworn to before me by Adam T. Siler this 5th day of November, 1910.

MINNIE MURPHY,  
*Notary Public in and for —— County, Kentucky.*

I hereby certify that in my opinion the foregoing demurrer is well-founded in point of law.

EDWARD W. HINES.

On a day following, to wit: on the 9th day of January, A. D., 1911, an order was made and entered herein, which said order is in words and figures as follows, viz:

MONDAY, January 9, 1911.

Court met pursuant to adjournment.

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance on the hearing and determination of the application for an interlocutory injunction and all questions arising in this case

No. 686.

LOUISVILLE & NASHVILLE RAILROAD Co., Complainant,  
vs.  
ADAM T. SILER et al., Defendants.

This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, the court files its written opinion herein.

Said Opinion of Court, filed January 9, 1911, is omitted herefrom. See 186 Fed. Rep. 176-204.

82 On a day following, to wit: on the 12th day of January, A. D. 1911, a Supplemental Opinion was filed herein, which was and is in words and figures as follows, viz:

In the United States Circuit Court for the Eastern District of Kentucky, at Frankfort.

No. 686.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Complainant,  
vs.  
ADAM T. SILER, LAWRENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

*Supplemental Opinion.*

In the opinion filed January 9th we assumed a certain state of facts not fully stated in the bill, and granted leave to amend the bill accordingly. A Second amended bill, containing paragraph XXI is now tendered for filing. This amendment is much more extensive than we had contemplated, but, upon careful reading and observing the distinction between its statements of facts and its reiteration of argumentative results and legal conclusions, it does not present any question not fully considered in our opinion, and so is not beyond the intention of the leave granted. It may be filed.

January 12, 1911.

J. W. WARRINGTON,  
*Circuit Judge.*  
ARTHUR C. DENISON,  
*District Judge, Specially Assigned.*

Filed Jan'y 12, 1911. Chas. N. Wiard, Clerk.

The Second Amended Bill, referred to in the foregoing Supplemental Opinion and filed herein on Jan'y 12, 1911, is in words and figures as follows, viz:

83 In the Circuit Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.  
ADAM T. SILER et al., Defendants.

*Second Amended Bill of Complaint.*

To the Judges of the Circuit Court of the United States for the Eastern District of Kentucky:

The complainant, Louisville & Nashville Railroad Company, brings this its amended bill of complaint against Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, constituting the Railroad

Commission of the State of Kentucky, defendants, and thereupon states.

## XXI.

That by Section 2 of the Act to regulate commerce it is provided: "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, draw-back, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

And complainant states that by Section 3 of said Act it is further provided:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular persons, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Complainant states that by Section 6 of the Act to regulate commerce, it is provided:

"That every common carrier subject to the provisions of this Act shall file with the commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route."

84 Again, in the same section of the Act to regulate commerce it is provided:

"No change shall be made in the rates, fares and charges \* \* \* which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public, published as aforesaid, which shall plainly state the change proposed to be made in the schedule then in force and the time when the changed rates, fares and charges will go into effect."

In the same section it is provided:

"No carrier \* \* \* shall charge, or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff, than the rates, fares and charges which are specified in the tariff filed and in effect at the time."

The complainant states that the Interstate Commerce Commission

has construed these provisions as requiring each interstate carrier to publish and file with the Commission its schedules of rates between different points within a single State where they are factors in the construction of an interstate rate.

Rule No. 5, as shown in Tariff Circular No. 15-A of the Interstate Commerce Commission publishing "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules and Administrative Rulings and Opinions" effective April 15, 1908, is as follows:

"The practice on part of carriers of accepting and transporting through shipments, as to which no joint rate applies, upon rates made up by combination of the rates of the several carriers participating in the movement, and of collecting, as delivering carriers, the aggregate charges of the several carriers upon such shipments, and of accounting to such carriers for their several portions of such charges, is practically universal. That custom has the same binding effect as a joint rate, both as between carriers themselves and as between carriers and shippers. Therefore carriers may apply to through shipments rates to and from stations to and from which there is no applicable published joint rate by using lawfully published bases, locals or proportionals, in connection with other lawfully published tariffs.

Tariffs containing basing or proportional rates must specify clearly the extent and manner of their use, and tariffs that are especially intended for use in connection with published basing rates must show the I. C. C. numbers of tariffs in which bases can be found.

A carrier may provide in its tariffs that, in the absence of a specific rate from point of origin to destination of a through shipment, combination rate to or via certain points will be made upon specified basing point or points, or by using certain specified tariffs or rates, and the combination rate so specified will be the lawful rate for that shipment.

If no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing combination rate for it is prescribed, the lowest combination of rates applicable via the route over which the shipment moves is the lawful rate for that shipment.

Such combination through rate must be treated as a unit from the date of original shipment to the date of its arrival at destination, and the rate applied must be the combination of the rates which exist upon the date of original shipment. All of the conditions, regulations, and privileges obtaining as to any factor in such combination rate for through shipment at the time of original shipment upon such combination through rate must be adhered to and cannot be varied as to that shipment during the period of transportation of such shipment to its final destination. A local or proportional rate "in" cannot be absorbed, diminished, or affected by any "out" rate not in effect at the time when the traffic moved upon such local or proportional rate."

The complainant further states that in the "Regulations governing the construction and filing of freight tariffs and classifications

and passenger fare schedules and Administrative Rulings and Opinions" of said Commission, approved June 28, 1909, Tariff Circular 17-A, effective September 1, 1909, page 30, the Interstate Commerce Commission has made the following ruling:

"13. (h) Rates for through shipments are often made by adding together two or more rates. All state or other rates used in combination for interstate shipments must be posted at points from which they apply and filed with the Commission, and can only be changed as to such traffic in accordance with the terms of the Act. The Commission believes it proper that all local tariffs be given I. C. C. numbers and be posted and filed with the Commission in manner prescribed in the Act."

The complainant states that the Interstate Commerce Commission in its "Regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules," last referred to, adopted the following rule which has ever since and is now in full force and effect (Rule 56), to wit:

(h) "Many informal complaints are received in connection with regularly established through rates or fares which are in excess of the sum of the locals between the same points. The Commission has no authority to change or fix a rate or fare except after full hearing upon the formal complaint. It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider the through rate or fare which is higher than the sum of the locals between the same points as *prima facie* unreasonable and that the burden of proof would be upon the carrier to defend such higher through rate or fare."

Complainant further states that the Interstate Commerce Commission on October 14, 1910, in the matter of application for relief under the fourth section of the Act of June 18, 1910, entered the following order:

86 "It is further ordered, That the Commission reaffirm its previously expressed view that a through rate or fare that is higher than the combination of the intermediate rates or fares is *prima facie* unreasonable (Rule 56 (b) Tariff Circular 17-A) and will insist upon the application of that principle at the earliest possible date in every instance except possible extreme and very unusual cases."

Complainant states it has obeyed and followed these rulings of the Interstate Commerce Commission, where the same were applicable, in the construction of its interstate rates and in the publishing and filing of its tariffs of such rates with that Commission.

Complainant states that the City of Cincinnati, Ohio, is situated on the north side of the Ohio River, which forms the State Line between Ohio and Kentucky, and that complainant's rates from said City situated on the North side of said river at the crossing thereof, for example, from Cincinnati to interior points in Kentucky, are and have always been the same or no higher than from Covington or Newport, Kentucky, immediately opposite on the south side of the Ohio River, to the same interior points in Kentucky on the same

kinds of freight or commodities carried in the same quantities and under the same conditions. No difference, in other words, is, or has been, made between the interstate and intrastate rates of the complainant from Cincinnati, or from Covington, or Newport to said interior points in Kentucky.

The Complainant further states that, if the rates fixed by the order of the defendants, constituting the Railroad Commission of Kentucky, dated August 10, 1910, are allowed to go into effect, immediately there will result an unjust discrimination against Cincinnati and all dealers in grain and other commodities used in the manufacture and shipment of whisky located and doing business in that city, who sell and ship the same to the interior stations on complainant's lines in Kentucky named in said order, and they will be subjected at once to "an undue or unreasonable prejudice or disadvantage" and will have to pay the existing interstate rates on said commodities, as set out in complainant's tariffs published and on file with the Interstate Commerce Commission, whereas, like dealers doing business just across the Ohio River or State line, in Covington or Newport, Kentucky, under substantially similar circumstances and conditions, can and will sell and ship the same commodities in the same quantities to the same interior distillery points in Kentucky on complainant's lines at the materially lower rates prescribed in said order, and will, therefore, receive "an undue or unreasonable preference or advantage."

Complainant states that there exists no circumstance or condition by reason of which shipments of the articles or commodities named in said Commission's order, originating at Covington or Newport, are or would be entitled to be transported to said distillery points at less rates than are in force and covered by said interstate tariffs from those points on interstate shipments coming from without the State of Kentucky, or from Cincinnati.

The complainant further states that what is true of complainant's rates on said articles and commodities at the Cincinnati crossing of the Ohio River is likewise true of its rates at the Louisville crossing of said river.

The table filed herewith as part hereof marked "Statement No. 1" compiled from the existing official tariffs of complainant on file with the Railroad Commission of Kentucky and the Interstate Commerce Commission, respectively, effective March 25, 1910, ever since and now in force, illustrates what has been above stated with respect to the complainant's present rates, applicable to interstate and intrastate shipments from the Cincinnati crossing of the Ohio River, as compared with the State Commission's rates from Covington and Newport, Kentucky, to the three interior points in Kentucky named in the order of August 10, 1910, on grain and other articles and commodities shipped in quantities as set out in said order, and shows the discriminations created by said order in favor of intrastate traffic and against interstate traffic.

The table filed herewith as part hereof marked "Statement No. 2," compiled from the same sources, shows complainant's rates on said articles and commodities shipped in quantities set out in said

order, applicable to interstate and intrastate shipments from the Louisville crossing of the Ohio river, as compared with the State Commission's rates to the 16 interior points in Kentucky named in said order, and shows the discriminations created by said order in favor of intrastate traffic and against interstate traffic.

The table filed herewith as part hereof, marked "Statement No. 3", compiled from the same sources, shows complainant's rates from Cincinnati, applicable on interstate traffic originating there and also at points north of the Ohio river (not on complainant's lines), as well as complainant's present rates from Covington and Newport, Kentucky, applicable on intrastate traffic from the latter points proper, and also on interstate traffic originating at points north of the Ohio river (not on complainant's lines); and the rates ordered by the State Commission applicable on intrastate traffic from Covington and Newport, Kentucky, all to certain distillery stations on complainant's lines in Kentucky, and complainant's existing rates to the same and to all other distillery stations on its lines in that State.

The table filed herewith as part hereof, compiled from the same sources, marked "Statement No. 4," shows complainant's present rates from Louisville, Kentucky, applicable on interstate traffic, originating at points north of the Ohio river (not on complainant's lines), as well as complainant's present rates from Louisville, Kentucky, applicable on intrastate traffic, and the rates ordered by the State Commission applicable on intrastate traffic from Louisville, Kentucky, to certain distillery stations on complainant's lines in Kentucky, and complainant's existing rates to the same and to all other distillery stations on its lines in that State.

The complainant further states that at least one-sixth of the total volume or movement of said articles and commodities as set out in said order from Covington and Newport to the 3 interior points in Kentucky named therein, to wit: Bardstown, Coon Hollow and Silver Creek, and from Louisville to the 16 points in the interior of Kentucky named in said order, is and will continue to be 88 in interstate commerce, or originates and will originate at points outside of the State of Kentucky, and is and will be transported across the Ohio river at Cincinnati and Louisville to complainant's lines in Kentucky.

Complainant further states that prior to February 10, 1910, its special rates on distillers' supplies, or the articles and commodities set out in said order of August 10, 1910, were applied on both interstate and intrastate traffic to 48 stations in all on complainant's lines in Kentucky, including the 16 named in said order, where distillery plants were, have been since, and are now located, namely:

Athertonville	Eminence	Lotus
Bardstown	Falmouth	Memphis Junction
Berry	Garnett	Morgan
Bloomfield	Gethsemane	Nazareth
Bourbon	Gilbert	New Hope
Boyd	Greenbrier	Campbellsville
Calvary	Levingood	Chapeze
Early Times	Loretto	Chicago

Clermont	Hunters	Robinson
Coon Hollow	Jett	St. Marys
Crab Orchard	Kellers	Samuels
Cynthiana	Kiserton	Shawhan
Dantz	Lair	Silver Creek
Deatsville	Lancaster	Silver Springs
Haden	Lebanon	Willow Springs
Hobbs	Poindexter	Withrow;

that from February 10, 1910, to March 25, 1910, its said special rates on distillers' supplies as aforesaid were applied on intrastate traffic to all of said 48 stations; and that since March 25, 1910, complainant's present rates, as covered by the tariffs aforesaid on file with the State Commission and Interstate Commerce Commission, have applied and are still in force from Louisville, Covington and Newport, Kentucky, to all of said 48 stations on such supplies, articles or commodities shipped in quantities as set forth in said order of the Commission.

Complainant states that the volume or movement in said supplies, articles and commodities from said cities on the Ohio river to the 32 stations at which such distillery plants are located, other than the 16 named in said order, has heretofore been and will continue to be at least three times as great as the volume or movement of such supplies, articles, or commodities from and through said cities on the Ohio River to the 16 points covered by said Commission's order; and the complainant's loss in revenue, if it is compelled to put in the rates prescribed by said order to said 32 stations from said cities in Kentucky on the Ohio River, will be at least three times as great as its loss in revenue will be on account of having to put in the reduced rates prescribed by said order from said Ohio River cities to the 16 points named in said order, or will be a loss of at least \$54,000 annually in its rates, intrastate and interstate, on such shipments to said 32 distillery stations, as

89 compared with a loss of at least \$18,600 on intrastate and interstate shipments to said 16 distillery stations. These losses will be exclusive of those on shipments of like commodities to consignees other than distillers at said points, which if included, would make the total losses to complainant very much larger per annum.

Complainant further states that at least one half of the volume or movement of such supplies, articles, or commodities to said 32 distillery points has heretofore been and will continue to be in interstate commerce, entering the State of Kentucky at the Cincinnati and Louisville crossings of the Ohio River, and of complainant be compelled to apply the rates prescribed by said order to such interstate shipments to said 32 distillery stations, its loss on its interstate revenues will be at least \$27,000 annually, and its loss on its intrastate shipments to said 32 distillery stations will be as much as the last named amount annually.

The complainant states that a large volume of interstate traffic in corn, rye, barley, malt, and other distillers' supplies is constantly moving from points north and west of the Ohio River through

Covington and Newport to the distillery stations named in the said order of August 10, 1910, as well as the 32 other distillery stations on complainant's lines in Kentucky, and the through rate charged and collected thereon from points north and west and beyond Cincinnati is and has been the same as the rate from those points of origin to the Ohio River, plus the rate south of the river.

The complainant states that the direct, immediate and necessary operation and effect of the putting into force of the intrastate rates on the commodities as prescribed in said order of August 10, 1910, will be to compel complainant, unless it surrenders its right to transact such interstate commerce business, and gives it up entirely, either, on the one hand, to change and reduce its existing rates (which are just and reasonable and covered by its tariffs on file with the Interstate Commerce Commission, as aforesaid) on interstate shipments of like commodities, originating at Cincinnati and other points outside of Kentucky, north and west of the Ohio River, and entering that State at the Cincinnati or Louisville crossing of the Ohio River, destined to the points named in said order, or, on the other hand, to continue its said rates on interstate shipments in full force and effect without change or reduction, leaving them materially and substantially higher on the same commodities shipped in like quantities from Cincinnati and other points outside of Kentucky for the same distances in Kentucky, or on the south side of the Ohio River, to the same destinations named in said order, thus creating unjust discriminations against shippers of such traffic in interstate commerce by charging, demanding, collecting and receiving from them a greater compensation for the service rendered in the transportation of property than it charges, demands, collects or receives from other shippers for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, as well as giving undue and unreasonable preferences or advantages to the

90 shippers of such traffic in intrastate commerce in Kentucky,

and subjecting such shippers of the same class of traffic to the same destinations from points outside of the State of Kentucky, and the city of Cincinnati and other localities north and west of the Ohio River to undue and unreasonable prejudice and disadvantage in said respects, in violation of the provisions of Sections 2 and 3 of the Act to regulate commerce, hereinabove quoted.

Complainant states that said order of August 10, 1910, is illegal and void because it thus substantially interferes with, burdens and regulates interstate commerce and hampers the enforcement of the Act to regulate commerce, and compels complainant to abandon or surrender the rights which it has under the Constitution and laws of the United States to exercise, and places complainant in such a position that it cannot enjoy its rights and powers under said Constitution and laws in the transportation of interstate traffic and at the same time obey the provisions of the said order.

The complainant further states that it cannot obey the provisions of said order with respect to the 16 distillery stations alone

out of the 48 distillery stations in all on its lines in Kentucky without violating the provisions of Section 817, Kentucky Statutes, against unjust discrimination, and the provisions of Section 818, Kentucky Statutes, against making or giving undue or unreasonable preferences or advantages and against creating undue or unreasonable prejudice or disadvantage, and the necessary result of putting in the rates under the Commission's order would be to compel complainant to reduce the intrastate rates proportionately to each of said other 32 stations at which distilleries are located, or to violate the provisions of the Kentucky Statutes aforesaid, and the necessary, immediate and direct burden upon the interstate rates to said 32 distillery stations would similarly be imposed, and as to these complainant would be compelled to surrender its rights under the Constitution and laws of the United States precisely as in the case of the interstate rates to said 16 distillery stations set forth in the Commission's order.

Wherefore, Complainant prays as in its original bill as amended, and for all other relief to which it may appear to be entitled.

WILLIAM G. DEARING,

ALBERT S. BRANDEIS,

HENRY L. STONE,

*Attorneys for Complainant.*

STATE OF KENTUCKY,

*Jefferson County, set:*

Personally appeared before me, G. W. B. Olmstead, a Notary Public in and for the County and State aforesaid, W. L. Mapother, First Vice President of the complainant, Louisville & Nashville Railroad Company, and states he knows the contents of the foregoing amended bill; that the facts therein stated as of complainant's 91 own knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

W. L. MAPOTHER.

Subscribed and sworn to before me this the 11th day of January, 1911.

In witness whereof, I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My Commission expires on January 4, 1914.

[SEAL.]

G. W. B. OLMSTEAD,  
*Notary Public, Jefferson County, Kentucky.*

(Endorsement:) Lodged with us Jan'y 12, 1911. Denison, D. J. Filed Jan'y 12, 1911. Chas. N. Wiard, Clerk.

The tables filed with 2nd Amended Bill and marked "Statement No. 1," "Statement No. 2," "Statement No. 3," and "Statement No. 4" are omitted.

92 On the same day, to wit: on the 12th day of January, A. D., 1911, an order was made and entered herein, which said order is in words and figures, as follows, viz:

United States Circuit Court, Eastern District of Kentucky, Frankfort Division.

THURSDAY, January 12, 1911.

Court met pursuant to adjournment:

Present: Hon. John W. Warrington, Circuit Judge, specially designated to sit in this case, and Hon. Arthur C. Denison, District Judge, and Hon. Edward T. Sanford, District Judge, called by him to his assistance, on the hearing and determination of the application for an interlocutory injunction, and all other questions arising in this case.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.  
ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, and the opinion of the court thereon having been filed on January 9, 1911 and leave for further amendment having been given, and a second amended bill, paragraph XXI having been this 12th day of January, 1911, filed pursuant to such leave, and such second amended bill having been also considered.

It is ordered, that such motion be and is hereby denied.

And it being represented in open court that complainant desires to appeal from the foregoing order, and it appearing that irreparable injury to complainant would result from the denial of such injunction if, upon appeal, such injunction should be granted.

It is further ordered, that the existing restraining order of date September 7, 1910, is continued for the period of thirty days from this date; provided that complainant perform the following four conditions:

1. Take and perfect its appeal from this order denying the interlocutory injunction.

2. File with the clerk a complete statement of all freight charges received by it before January 1, 1911, and since August 10, 1910, in excess of the rates fixed by the commission order of that date, and pay into court the total amount of such excess charges. Such statement shall show the names and addresses of all parties paying such excess. Such money paid into court, and subsequent similar payments, shall be refunded to the parties paying the excess, respectively, if it shall finally be determined that such excess was not lawfully collected—otherwise to be returned to the complainant.

93        3. Thereafter, and on the 15th of each month, commencing February 15, file a similar statement and make a similar payment covering the preceding calendar month,—such monthly statements and payments to be continued until the further order of this court or the Supreme Court.

4. File with the clerk a bond to the United States for the use of such parties as this court may direct, in the penalty of \$10,000, with surety approved by the clerk, conditioned for the performance of all the provisions of the preceding paragraph No. 3.

And it is further ordered that such restraining order be and is hereby then further continued until the disposition of the appeal by the Supreme Court and by mandate or until the Supreme Court otherwise order,—unless defendants should make it appear to this court that condition 1, 2 or 4 has not been performed within such thirty days.

On a day following, to wit: on the 6th day of February, A. D., 1911, the following order was made and entered herein, which said order is in words and figures as follows, viz:

Court met pursuant to adjournment.

Present: Honorable Henry F. Severens, Circuit Judge.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant.

v

ADAM T. SILER, LAWRENCE B. FINN, and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, Defendants.

This day came the complainants, Louisville & Nashville Railroad Company, and in accordance with the terms of the order entered herein January 12, 1911, filed in court its written statement, signed by Chas. Haydon, Comptroller, showing amounts paid by various consignees and shippers named therein on distillers' supplies, etc., on shipments moving from August 10th, to December 31st, 1910, inclusive, in excess of amounts they would have paid had shipments been charged for on basis of rates as fixed by the Kentucky Railroad Commissioner's order of August 10th, 1910, the several amounts aggregating for said period the sum of \$6,248.49, which was paid into court by the draft of said Comptroller to C. N. Wiard, Clerk of this court on W. W. Thompson, Treasurer of said Company, which amount the Clerk is ordered to hold, subject to the further order of the Court herein.

94 In the United States District Court for the Eastern District of Kentucky.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
versus  
LAURENCE B. FINN et al., Defendants.

On the 8th day of January, A. D., 1914, came the complainant and tendered, and by leave of court was allowed to file its amended and supplemental bill of complaint, which is in words and figures, as follows, viz:

95 In the United States District Court for the Eastern District of Kentucky.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kober, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, Defendants.

*Amended and Supplemental Bill of Complaint.*

The complainant, Louisville & Nashville Railroad Company, by leave of court, brings and now files this its amended bill of complaint against the above mentioned defendants, and thereupon states:

That since the institution of this suit, the terms of original defendants, Adam T. Siler, Lew P. Tarlton and Laurence B. Finn, as members of the Railroad Commission of Kentucky, have expired, and to the positions on said Commission, formerly held and occupied by said original defendants, Siler and Tarlton, the defendants, Green Garrett and William Klair, respectively, have been duly elected and qualified, and are now lawfully acting members of said Commission, and to the position, on said Commission, the said original defendant Laurence B. Finn, formerly held and occupied, he has been duly re-elected and qualified and is now lawfully acting as the other

member of said Commission, and is also the duly elected and acting Chairman thereof.

The said defendants, Garrett, Klair and Finn, individually and as constituting the said Commission, as aforesaid, on the appeal by complainant to the Supreme Court of the United States from the order of the court herein, denying complainant's motion for an interlocutory injunction on January 12, 1911, entered their appearance in the Supreme Court as appellees, and are now before this court, and no process is necessary against them as such defendants, either upon the original bill as amended or this amended and supplemental bill.

## II.

The complainant, in pursuance of the opinions of this court and the Supreme Court, that it is necessary to do so, before injunctive relief can be granted as to the awards granted by

97 said Commission against complainant, as set forth in complainant's original bill herein, now makes defendants to its original bill as amended, and to this amended and supplemental bill, the following corporations, each of which is duly organized and existing under the laws of the State of Kentucky, and empowered to sue and be sued, and to carry on the business of distillers, and having their chief offices or places of business in the towns and cities or at the stations, set opposite their respective names, to which the said Commission by its order of August 19, 1910, awarded the several sums set opposite their names, to-wit:

Greenbrier Distillery Co., Greenbrier, Ky.....	\$532.62
Wright & Taylor, Chapeze, Ky.....	257.50
Old Gran Dad Distillery Co., Hobbs, Ky.....	231.38
S. Grabfelder & Co., Clermont, Ky.....	325.78
Taylor & Williams, Gethsemane, Ky.....	237.19
Tom Moore Distillery, Bardstown, Ky.....	44.51
Mueller, Wathen & Kober, Lebanon, Ky.....	400.77
Early Times Distillery Co., Early Times, Ky.....	408.51
Clear Springs Distilling Co., Bardstown, Ky.....	481.89
T. W. Samuels Distillery, Deatsville, Ky.....	123.42
W. B. Samuels & Co., Samuels, Ky.....	58.81
Willow Springs Distilling Co., Coon Hollow, Ky.....	321.62
Blair, Osborne & Ballard Distilling Co., Chicago, Ky.....	42.96
M. C. Beam & Co., Gethsemane, Ky.....	57.42
Head & Parker, Gethsemane, Ky.....	44.80
Burks Spring Distillery Co., Loretto Ky.....	145.25
Eminence Distillery Co., Louisville, Ky.....	248.37
Warwick Distillery Co., Ky.....	127.74

## III.

98 The complainant states further, by way of amendment to its original bill, and particularly to Paragraphs XV and XVI thereof, the said Commission by its order of August 10, 1910, awarding to said corporate defendants the several sums hereinabove set forth

exceeded its powers and authority conferred upon it by law or by the McChord Act of March 10, 1900, under the provisions of which Act the complaint of said corporate defendants was instituted and prosecuted before said Commission, and under which said Commission assumed jurisdiction to hear and determine said complaint.

The complainant states that while the said corporate defendants in their complaint before said Commission proceeded under the provisions of said McChord Act, now Sec. 820a, Kentucky Statutes, there is no provision thereof which authorized or empowers said Commission to award to any one who institutes or prosecutes a complaint thereunder any sum for reparation in damages upon the basis of past transactions, or for the difference between a rate theretofore charged and collected or received by a railroad company and the rate which said Commission may fix, which such company may charge, collect or receive for like services thereafter rendered.

But the complainant states that notwithstanding such lack of power or authority in said Commission, under the provisions of said McChord Act, to make the awards for the difference between the

99 rates on the commodities described in complainant's original bill and the exhibits filed therewith as part thereof alleged

to have been charged, collected or received from said corporate defendants from March 25, 1910, to August 10, 1910, and the rates thereon fixed by said Commission at the latter date, the said Commission then erroneously claimed and asserted and still so claims and asserts such power or authority existed under and by virtue of the provisions of Sec. 829, Kentucky Statutes, enacted April 5, 1893, which is as follows:

"Sec. 829. Complaints against companies—Award of Commission—Proceedings upon.—The Commission shall hear and determine complaints under Sections 816, 817 and 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the Commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of such controversy, and the clerk of said court shall enter the same on the docket for trial and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that 100 no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before

the Commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases."

The complainant states that the three Sections (816, 817 and 818, Kentucky Statutes), referred to in the foregoing Section 829, Kentucky Statutes, and enacted at the same time the latter section was, are now and were on August 10, 1910, as follows:

"**SECTION 816.** Extortion. What is.—If any railroad corporation shall charge, collect or receive more than a just and reasonable rate, toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion.

"**SECTION 817.** Discrimination. What is.—If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

"**SECTION 818.** Preference or advantage forbidden—Rules defining same—Quantity of freight.—It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more carloads of freight shall be transported at the same time for different persons, and for each shipper a carload or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law; and when less than a carload of freight and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds and less than five thousand pounds are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight."

The complainant states the complaint of said corporate defendants before said Commission, was not under the provisions of either of said Sections 816, 817 and 818, Kentucky Statutes, but under the provisions of the McChord Act of March 10, 1900, which, as heretofore alleged, vested no power or authority whatever in said Commission to make said awards in favor of said corporate defendants against complainant.

The complainant states that said Sections 816 and 818, long prior to August 10, 1910, had been held by the decisions of the Court

of Appeals of Kentucky, to be unconstitutional and void, in connection with Section 819, Kentucky Statutes, which latter section was at the time of said decisions and is still as follows:

"SEC. 819. Penalty and damages for extortion—Discrimination—Preference—Jurisdiction—Duty of Commission—Limitation. Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The Circuit Court of any county into or through which the line or railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin Circuit Court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporations shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

The complainant states that said Section 829, Kentucky Statutes, is unconstitutional and void on its face, being violative of both the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States, by reason of the qualifying and prohibitive clause in the concluding sentence thereof with respect to the trial in the Circuit Court of the county or counties, which, under the Code of Practice of Kentucky, would have jurisdiction of the controversy, as follows:

"If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence."

The complainant states that this provision renders said Section 829 unconstitutional, as aforesaid, for the reason, if said section is applicable at all, that in the first and only judicial inquiry concerning the unreasonableness and unjustness of rates for the collection of which reparation may have been awarded by the Com-

mission, the right of the parties to introduce all material, competent and relevant evidence, as well as the right of the railroad company to make all its legal defenses, is prohibited and prevented by the clause thereinabove quoted. Instead of providing to the railroad company by an order awarding reparation made by said Commission the equal protection of the laws, said Section 829 denies to it such protection and deprives it of its property without due process of law as hereinabove alleged.

## V.

The complainant states that since said Section 816 was declared to be unconstitutional and void on April 4, 1896, in *Louisville & Nashville Railroad Co. v. Commonwealth*, 99 Ky. 132, and since the passage of the McChord Act of March 10, 1900, wherein extortion, in the matter of railroad rates, is defined to be the charging, collecting or receiving by a railroad company, or any officer, agent or employe thereof, "a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission," as provided in that Act, the said Commission has had no power or authority to make an award for reparation based on past transactions.

The McChord Act embodies and constitutes the entire and only scheme to define and prevent extortion in the matter of intrastate railroad rates, and the method provided therein for the prevention of such extortion supersedes and is exclusive of all other statutory remedies, civil or penal, theretofore attempted in the State of Kentucky, or in connection with which said Commission has been assigned by statute any duty to perform in dealing with such extortion.

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## VI.

The complainant states that on account of its failure and refusal to pay to the corporate defendants the several awards made by said Commission as aforesaid, the defendant, Laurence B. Finn, as Chairman of said Commission, pursuant to said order of August 10, 1910, is about to file and, unless enjoined and restrained from so doing, will file a certified copy of said order in the office of the clerk of the Circuit Court of each of the counties, which, under the Kentucky Code of Practice, would have jurisdiction of such controversy, that is to say, the counties into or through which the lines of complainant's railroads carrying the freight for the transportation of which said awards were made extend, for the purpose of enabling the said several corporate defendants, in whose favor said awards were made, to cause, and unless they are enjoined and restrained from so doing they will cause the clerks of the circuit courts in such counties, upon the filing of a certified copy of said order making the awards aforesaid, to enter on the docket for trial each of said awards as a separate suit at law, wherein the corporate defendant in whose favor the same was made shall be the plaintiff and this complainant shall be the defendant, and to cause a summons to be

issued thereon, as in other cases against this complainant, requiring it to appear in court within the time allowed in ordinary cases (ten days) and show cause why said award shall not be satisfied. Thus complainant will be subjected to a multiplicity of suits at law (not less than eighteen) in different circuit courts, involving the same questions of law and fact, which multiplicity of suits complainant seeks to avoid.

106 The complainant states that in the defense of said suits it would have no adequate remedy at law or fair and reasonable opportunity upon a jury trial to show by material, competent and relevant testimony the reasonableness and justness of the rates complained of by said corporate defendants, or the unreasonableness and unjustness of the rates fixed in lieu thereof by said Commission; and the merits of its defenses justifying its failure and refusal to pay the awards made by said Commission against it in favor of the said corporate defendants, respectively, can not be tried and determined in a court at law, or be fairly, fully, completely and finally settled and adjudicated, once for all, otherwise than in a court of equity.

## VII.

The complainant, by way of amendment to its original bill as amended, further states the complaint of the corporate defendants, Greenbrier Distillery Company and others, against this complainant before said Commission referred to in the original bill as amended, was heard and tried by said Commission at the Galt House, in the city of Louisville, Kentucky, on June 24, 1910, and all the evidence offered or introduced by the parties to said complaint or proceeding, and all the evidence heard or considered by said Commission, was at said hearing, and no other evidence or testimony than that 107 then offered or introduced by the parties, was heard or considered by said Commission in the trial and determination of said complaint or proceeding, and all of said evidence and testimony in the trial of said complaint and other proceedings before said Commission at the time and place aforesaid were taken down by Miss Minnie Murphy, the official stenographer or reporter the same were transcribed by her in typewriting and filed in the office of said Commission, but the original of said transcript has been lost or so mislaid the same, after diligent search made by the present Secretary of said Commission, can not be found.

The complainant states, however, that it has been furnished by said stenographer or reporter with a full, true, correct and complete copy of the transcript of all the testimony offered or introduced by the complainants and defendant and heard by the Commission on the hearing of the complaint at the time and place aforesaid, which copy contains 71 typewritten pages, and is certified and verified under oath to be such copy by said stenographer or reporter, and the same is herewith filed as part hereof, marked "Transcript."

The sworn testimony of the witnesses in said Transcript begins at page 22 thereof.

The complainant avers, as said Transcript shows, there was no substantial evidence whatever offered or introduced by the parties

or heard by the Commission to sustain the complaint before said Commission that the complainant's rates for the transportation of the commodities between the points therein named, put into force and effect on March 25, 1910, were unjust, unreasonable or extortionate, or to sustain the reasonableness or justness of the rates fixed by the Commission in lieu thereof "for like services thereafter rendered," either when such commodities were transported by complainant from and to the points of origin and destination named in the complaint for the uses of distillers alone, or for consignees generally, without designating the uses to which such commodities were to be put.

The complainant states the rate-order of August 10, 1910, by said Commission was made contrary to and without evidence, or any substantial evidence, to support or sustain it or to support or sustain the rates thereby fixed, and was and is, therefore, so arbitrary, unreasonable and unjust as to render said order null and void, and the same operates to and does deprive the complainant of its property without due process of law and denies to it the equal protection of the laws, in violation of the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

### VIII.

The complainant further avers that there was no evidence whatever offered or introduced by the parties before said Commission at the hearing or trial of said complaint to support or sustain the reparation order of said Commission (even if it had lawful power to make or promulgate the same), or to support or sustain the amount of said awards in behalf of the corporate defendants herein or of either of said awards, and the same were and are, therefore, arbitrary, null and void.

### IX.

The complainant states that the complaint before said Commission instituted by the corporate distillers therein named, whose distillery plants were located at the 16 points therein stated on complainant's railroads, after setting out the fact that complainant had "for many years prior to March 25, 1910," transported over its said lines to said distillery plants the various commodities used for distillery purposes at the special rates shown in Exhibit A, with their complaint, and then established at that date the increased or standard rates on said commodities, designated as new rates in said Exhibit, contains the following averment:

"That defendant as aforesaid had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants, upon the faith of said former rates, and had maintained said former rates for many years, as just and reasonable rates, all of which were and are fairly remunerative, and are and were no more than just and reasonable compensation for the transportation of said commodities to and from said points."

The gravamen of said complaint was the supposed equitable estop-

pel urged against this complainant's right to increase or withdraw its special rates on distillers' supplies, and in lieu thereof put into force and effect on March 10, 1910, thereon its regular standard rates charged, collected or received from all consignees alike 110 on the same commodities transported between the same points or for like distances over the same lines, which were not alleged in said complaint to be unjust or unreasonable upon any other ground or for any other reason than the one expressly stated in said complaint, viz.:

"That defendant had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants upon the faith of said former rates."

Upon that ground alone the restoration of the special rates was sought, because they "had been maintained for a number of years."

The said Commission delivered no opinion showing or finding the facts on which its conclusion with respect to the rates complained of was reached. The rate-order of said Commission made August 10, 1910, herein complained of, when taken in connection with said Transcript of the evidence, shows that said Commission assumed powers not possessed by it; their powers being wholly statutory, do not extend to regulating or controlling the policy of the owners of railroads in fixing rates, and said Commission can not lawfully substitute, as it attempted to do by its said rate-order of August 10, 1910, for a just and reasonable rate, such as is charged, collected or received from all consignees alike on the same commodities transported between the same points over the same lines, a lower rate, either on the ground of policy or on the ground that the railroad company was by its former conduct estopped from charging, collecting or receiving a reasonable rate. The corporate distillers 111 who instituted and prosecuted said complaint before said

Commission did not complain of the new and higher rate, because it was intrinsically, or in and of itself, an unreasonable one, but because, although reasonable for all consignees other than distillers, the complainant railroad company was estopped to advance it on account of having maintained the lower rate for a considerable period. Under such conditions and circumstances, it was beyond the statutory power of said Commission to direct a restoration of the old rate, as it assumed to do by its rate-order of August 10, 1910, herein complained of, which is, therefore, null and void.

In Consideration Whereof, and inasmuch as complainant in the premises is remediless at law, and can obtain adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end that the defendants hereinabove and hereinafter named may answer the several matters and things hereinabove set forth as fully and particularly as if the same were again herein repeated and they were thereunto interrogated, complainant prays that an interlocutory injunction may issue out of this court, enjoining and restraining the defendants, Laurence B. Finn, Green Garrett and William Klair, and each of them individually and as constituting the Railroad Commission of Kentucky from in any manner continuing said Commission's rate-making order and reparation order made August 10, 1910, and promulgated

August 31, 1910, and from recommending or causing to be instituted any prosecution by indictment or otherwise or civil 12 action against the complainant, or any of its officers, agents or employes, to recover any fine or penalty imposed by said McChord Act, enacted March 10, 1900, for or on account of the complainant's failure or refusal to put into force or effect on its lines of railroad in the State of Kentucky, under protest or otherwise, said Commission's rate-order made August 10, 1910, and promulgated August 31, 1910, or the rates fixed thereby or set forth in the schedule prepared then or thereafter; and also enjoining and restraining the defendant, Laurence B. Finn, as Chairman of said Commission, from filing a certified copy of the said order awarding certain sums for so-called reparation to the defendant, Greenbrier Distillery Company and the other corporate defendants named in this amended and supplemental bill made August 10, 1910, and promulgated August 31, 1910, or from filing a certified copy of the evidence heard at the hearing or trial of the complaint of said defendant, Greenbrier Distillery Company and others against the complainant, Louisville & Nashville Railroad Company, in the office of the clerk of the circuit court of any county in the State of Kentucky having jurisdiction of the amount of said awards or either of them, or the office of the clerk of the circuit court of any county into or through which the lines of railroad owned or operated by complainant extend and over which the freight commodities, concerning the rates on which said awards were made, were or are transported.

And that in the meantime and until a hearing and decision can be had upon complainant's motion for an interlocutory in- 113 junction hereinabove prayed for, a temporary restraining order be granted immediately enjoining and restraining the acts sought herein to be enjoined and restrained as aforesaid, the complainant hereby averring, as it does, that there is danger of irreparable injury from delay if action should not be taken until said motion for an interlocutory injunction shall be heard and determined; that a writ of injunction be issued commanding and enjoining and restraining the defendants, as above prayed for, and on final hearing that said injunction be made perpetual; that said orders of August 10, 1910, promulgated August 31, 1910, and the schedule of rates prescribed and the awards for so-called reparation made by said Commission thereunder be declared null and void by the decree of this court, and that complainant may have all other relief as prayed for in its original bill as amended, and as in equity it may appear to be entitled to.

And complainant prays that there be granted unto it the temporary restraining order and the interlocutory injunction aforesaid; the writ of injunction on final hearing aforesaid; and that a writ of subpoena, issuing out of this Honorable Court, be directed to the said corporate defendants named and set out in the caption of this amended and supplemental bill, commanding them and each of them, under a penalty to be therein fixed, to appear on some certain day to be therein named, before this Honorable Court, and

then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the averments set forth in complainant's original bill as amended and in this amended and supplemental bill, and to stand to and to perform and abide by such order, direction and decrees as may be made against them in the premises, and as shall seem to this Honorable Court to be meet and agreeable to equity and good conscience, and your complainant will ever pray.

LOUISVILLE & NASHVILLE RAIL-  
ROAD COMPANY,

By WILLIAM A. COLSTON.

ED S. JOUETT,

HENRY L. STONE,

*Solicitors.*

STATE OF KENTUCKY,

*Jefferson County, etc.:*

Personally appeared before me, G. W. B. Olmstead, a Notary Public in and for the County and State aforesaid, A. R. Smith, who being duly sworn by me states:

That he is the Third Vice President of the Louisville & Nashville Railroad Company, the complainant in the foregoing amended and supplemental bill of complaint; that he has read and knows the contents thereof; that the facts therein stated as of complainant's own knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

A. R. SMITH.

115 Subscribed and sworn to before me by said Smith, as witness my hand and official seal, at Louisville, Ky., this January 6, 1914.

My commission expires January 24, 1914.

G. W. B. OLMSTEAD,

[SEAL.] *Notary Public, Jefferson County, Ky.*

The Exhibit marked "Transcript" filed with and made part of the foregoing amended and supplemental bill of complaint is in words and figures, as follows, viz.:

116 Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,  
versus

LOUISVILLE & NASHVILLE RAILROAD CO., Defendant.

*Minutes of Meeting, June 24, 1910.*

The Railroad Commission of Kentucky met at the Galt House, in Louisville, Kentucky, on the 24th day of June, 1910, to hear and determine the case of the Greenbrier Distillery Company, and others,

against the Louisville & Nashville Railroad Company, filed in the office of the Railroad Commission May 29, 1910.

**Present:**

A. T. Siler, Chairman of the Railroad Commission.  
Laurence B. Finn, Commissioner.  
C. C. McChord, Attorney for Complainants.  
J. V. Norman, Attorney for Complainants.  
W. G. Dearing, Gen. Atty., L. & N. R. R. Co.

At this point the meeting was called to order by A. T. Siler, Chairman of the Railroad Commission, and both parties having announced ready, the attorney for plaintiff was asked to make a statement of the case, as follows:

117      **Mr. McCHORD:** I will make a brief statement of the facts as they exist today.

A number of years ago there were a lot of little distilleries out here on the Bardstown, Springfield branch, and the Knoxville branch, between Lebanon and Louisville, and on the Lexington branch as far as Eminence. Some gentlemen in Louisville, and elsewhere in the State, concluded that on account of the locality and rates, and circumstances generally, that they would invest a lot of money in these distilleries. I don't mean to say that they all bought the distilleries before the rate was in effect, but certainly after the low rate went into effect they spent hundreds of thousands of dollars on their investments. The matter drifted along some 15 or 18 years with the rates in effect that we have shown to the Commission in Exhibit "A," which has been filed with them.

On the 25th day of March, 1910, the Louisville & Nashville Railroad Company, for reasons best known to itself, increased all of these rates, and this puts these distilleries in this attitude: that many of them had made contracts for the sale of their goods, relying upon this rate which was already in effect as a basis in fixing prices on their product, and it puts them in the further attitude of being at a disadvantage with competitors elsewhere in getting to market because they have to pay this excessive rate.

Our contention is this—or, before I get to that—the main users of the product in these distilleries are shippers to these various points of the distillers themselves. Taking grain as an illustration. That

118      is comparatively a low shipment, and more consumption from Louisville to these various points, and I presume the railroad company recognizes the fact that it is just and right to make a concession in order to get these gentlemen to do business on their branch of road—it would give them a double haul. I confess I used to have a notion that there was no such thing as wholesale and retail in matters of freight rates, and I sort of feel that way yet, but the courts have taken the other view. The Interstate Commerce Commission and the courts recognize the fact that it is proper to make a lower rate on grain out to these distilleries when they get the rate back on the same line to the city of Louisville, and these rates have been added on this line for the reason that there was this much busi-

ness. Now the complainants think this increase on rates is a great injustice and in taking out the rate that has been in effect for years, because that rate was made by the railroad company and collected by them voluntarily and maintained by them for years and years. Now we want them to get back to the rate that they formerly had in effect, and not oppress these people to any greater extent than the rate which has been in effect for the past 15 years.

MR. DEARING: May it please the Commission, I will not say very much, as I want Mr. Goodwyn to make a statement of the facts in this case.

MR. McCORD: I want to state that you have not filled up the blanks in your petition, and I would like to have them filled up.

MR. McCORD: We will furnish you a copy of the petition properly filled up.

119 MR. SILER: In your statement, Mr. McCord, which you sent out to Judge Dearing on June 13th you say you have not received a statement from all your clients, I would like to ask if you have received them all now?

MR. McCORD: We have received two. The Eminence people were not in the complaint originally, but I have filed a petition to make them party plaintiffs in this case.

MR. DEARING: Let that be traversed.

MR. McCORD: We have their claim and one other for reparation. We will put them all in.

MR. DEARING: I want to make a motion in this case. I am going to take the position in the final argument of this case, even though you adjudge the rates to be reduced, that no reparation can be adjudged by this Commission. I think I have the authority to show that the Commission can not do this. I want to make that motion to strike.

MR. SILER: Very well, Mr. Dearing, suppose you just dictate the motion which you desire to make to the stenographer here and let it go in the record.

(Mr. Dearing makes the following motion:)

Now comes the defendant, Louisville & Nashville Railroad Company, and moves to strike from the complaint all those matters in regard to reparation, as this Commission has no authority to grant same.

MR. DEARING: In order to get the history of this matter, and as Mr. Goodwyn is better acquainted with it, I will ask him to state the facts as he knows them to be.

120 MR. GOODWYN: Mr. Commissioners, since this complaint was filed I have had our records examined and find that as far back as 1874 the Louisville & Nashville Railroad Company made reduced rates on grain for certain distilleries, to be used in the manufacture of whiskey, and about that same time it perhaps made a rate on barrels and one or two other commodities.

Originally the arrangements we had with them went from season to season. Mr. Miller, of Wright & Taylor, will remember when his firm bought the distillery at Chapeze he had an arrangement from season to season, which expired at the end of each year. There

never was a promise made by the Louisville & Nashville Railroad Company to keep this rate in beyond the expiration of the season. There was no obligation on our part originally, or at any time, which warranted any distiller in the belief that he could make contracts for the future on his products beyond the expiration of his season's business. He had no warranty for believing that he could make contracts in advance extending beyond the end of the season. The fact that it was continued from year to year evidenced, to my mind, that the Louisville & Nashville Railroad Company was holding to itself the right to change its rates at the expiration of any season, held it all the time until some five or six years ago when the new Kentucky law took effect—the long and short haul law, and since that time we found it necessary to go over all our contracts within the State of Kentucky in order that we would be within the

conditions of the law, and then, and not until then, did the  
121 Louisville & Nashville Railroad Company ever publish anything in the nature of a tariff of these rates. We first published these tariffs in what we call our "L" series, the L standing for "Local," meaning local arrangement, and these expired on December 31st of each year, and at the expiration of each year we would issue a circular that it was discontinued, so we would not have so much clerical work of repeating. We continued that until the Hepburn bill took effect. I only mention these facts to show that from the very beginning there was never any contract on the part of the Louisville & Nashville Railroad Company to continue the rates. So far as I have knowledge of the matter there never was any promise made them by any authorized representative of the Louisville & Nashville Railroad Company that the rates would be continued indefinitely. There never was any assurance given to any distillery that this, that or the other rate would be given. There never was any assurance to any distillery that if such and such improvements were made that this, that or the other thing would be given for their benefit and maintained for any given time.

Prior to 1899, the rates on grain, and I believe the rate on grain is the principal item, these gentlemen were all paying a rate on grain considerably higher than that in 1899. For example, our Bardstown rates were 8c. per 100, and another there being 5c. In other words, there was no reason why the present rate should not be charged. The reduction in 1899 was made because of the depressed conditions of the distilleries in the State at that time,

and it was a voluntary concession on the part of the L. &  
122 N. R. R. Co. It wanted to foster, help and encourage, and it still wants to, the distilleries along its line of road, and that has been continued from 1899 until 1910, for 11 years, though, in all frankness, the depressed conditions of 1899 have not continued throughout the 11 years, though when the times were more prosperous and the fat came out we got no benefit of it, we still had to take the lean, we got no increase of rates. We did not share in their prosperity, though we assumed a part of their burden when they were in distress. There was another condition existing, we made

extra low rates on whiskey to Louisville, and we made that exclusively for the purpose of bringing the whiskey into Louisville for whatever blending or bottling which may have been done here, which I believe is the largest whiskey market in the country, and our rates on whiskey were published originally, as arranged, exclusively to Louisville proper. I don't propose to name any names, but nevertheless it is a fact that those rates established by us on the L. & N., to stations along our line, have been used to deprive the L. & N. of the revenue to which it was entitled. For example, whiskey has been brought in here in car loads made up of consignments for half a dozen different destinations; it has been drayed from our line to the Big Four, Monon and other lines and moved from Louisville in less than car-load lots to its destination, which the L. & N. could have handled all the way in some instances. For example, California whiskies have been brought in here when the L. & N. owned a line of its own via St. Louis, New Orleans and other points, then it was taken by trunk lines. It does

123 seem that if we were expected to coddle the baby while it was an infant, that the baby ought to have been grateful. I am

glad to say that a number of the infants did, but quite a number did not. We would have continued that rate on grain, except for these conditions. When we were compelled under the Hepburn Act to issue our tariffs and file with the Interstate Commerce Commission our rates that might be used in conformity in making our interstate rates, it put us in the position where we could not carry these rates in the shape we handled them before. We had never filed our tariffs with the Interstate Commerce Commission previously. We had filed same with the Kentucky Railroad Commission. As those rates applied to and from Louisville, to and from Cincinnati, to and from Henderson, and Evansville, in some cases, we were compelled under the Hepburn Act to publish those rates and file with the Interstate Commerce Commission, and give them what is called "L. C. C." number, because the rate from Louisville to Alberta on grain could be used from Indianapolis to Alberta. We issued those tariffs and made them apply just as we had done for years on grain to be used in the manufacture and distilling of whiskey. The Interstate Commerce Commission refused them and said "we can not accept your tariffs, the Commission will not permit you in the issuance of those rates to discriminate between the purposes for which the commodity is to be used. If you are going to carry a 5c rate from Louisville to Alberta, you have got to carry the same rate from

124 Louisville to Alberta for any purpose. I think Mr. McChord will see that he is mistaken that the courts and Interstate

Commerce Commission had recognized making such rates. The Interstate Commerce Commission has never done that; the Kentucky Commission has never. The Pennsylvania Commission has decided it, or the Supreme Court. In other words, we could make a less rate on steam coal than on domestic coal.

Mr. SILER: The Kentucky Court of Appeals has stood by that?

Mr. GOODWYN: I think so.

Mr. GOODWYN: We were then bound to face this condition that

we could not make these rates applicable on interstate and preserve our revenue on the other. We canceled the rate on this interstate traffic. I think you will remember that we could not advance any back charge, that would have to be separate and distinct charge or shipment to Louisville, in other words, purely intrastate transaction. We still continued it. A certain gentleman in Indianapolis was in the grain business and wanted to sell some grain to a distiller on our line and the distiller told him he could not buy from him, that he was out of it, because if he bought of him he would not get his rates. The gentleman inquired and found out what the situation was and immediately consulted his lawyer and drew up a petition to the Interstate Commerce Commission to compel us to give him the rate. Well, we were then on the horns of a dilemma. Don't think it means the acumen of any lawyer here present to determine what the Interstate Commerce Commission would be that you could not distinguish between rates for the purpose for which it is to be

125 used. The Interstate Commerce Commission would compel us to make a rate from Indianapolis to Athens, or Indianapolis to Louisville, apply on any kind of grain, not only to Athens but to every distillery on our line in every part of the State. Compel us to copy its rates not for distillery purposes, but for any other sort of purposes. We would then be bound to face this condition. We would be accepting less money from Louisville on general commodities, grain from Princeton, Indiana, or Chapeze than charged at Louisville. I think I know what you would say to that, but it would not be necessary for you to say it. But ever since I have been with the L. & N. R. R. Co., it has been customary not to charge less on business originating beyond than at Louisville proper. We do not want to make a 5c. rate on grain from Louisville to Bardstown. There is no greater reason why we should make that rate from here to those distilleries. I mean as to rate *per se* not of itself, because the greatest portion of the grain comes from there. There is no reason why we should make that rate from Louisville apply to every immediate point which takes in our entire line, than we should make that same rate on Kentucky grain going from there into Louisville. If 5c. is the right rate from Louisville to Springfield, Kentucky, on grain for commercial purposes, then 5c. is the right rate on grain from Springfield to Louisville. What is our condition? We had continued those rates, especially made for the benefit of the distilleries, for a period of 31 years. They did not go

126 up when the distilleries' business became prosperous. They were continued the same as long as we could continue them with justice to ourselves. They were continued to the point where prosecution was threatened by the Interstate Commerce Commission. And I say while we would be willing to restore those rates if it could be done under the conditions prior to the withdrawal, we do not believe the interests of the L. & N. should be made to suffer seriously; we do not believe the scale of our rates should be pulled down over the entire State for the purpose of benefitting the distilleries alone.

Mr. FINN: Under your present tariff do you charge the same for

shipping grain into Louisville as you do for shipping grain out of Louisville to the self same points on your line?

Mr. GOODWYN: I think it is practically the same. If it is not, I have no objections to making it so.

Mr. FINN: While this arrangement did exist, if the railroad gave the distilleries a refund on wheat, or grain, did the shippers on that line have the privilege of that same refund into Louisville?

—. No, because the business that came here either went beyond, but on the wheat which is brought in here they have a refund on the wheat when it is shipped out. I will say there are no shipments of grain which originate in Louisville, there is no grain grown on the streets of Louisville, it is brought in here.

Now this is the position we are in, and we feel that we should not be made to suffer for the purpose of continuing these rates, especially when we feel that we are in a position to deny that 127 there was ever any guarantee on the part of the L. & N. R. Co., that they would be continued.

Mr. SILER: You have no objections to continuing same if you can do so under the law?

Mr. GOODWYN: In talking with the representatives of the distilleries I think I told them what I am telling you here, exactly the same thing. I said, "now you suggest some way by which we can do this." I said, "take these articles other than grain on which we have been making special rates, such as bottles, barrels, etc., that will not hurt us, there is nothing moving in the opposite direction, and I am willing to see if we can not do that. No, they wanted the grain. That is the item which affects them most. I asked them to tell me how it did affect them, to what extent. I have not found out. I know how much we have paid them as refund. We adopted this refund system simply to protect ourselves against the rate for commercial purposes.

Mr. FINN: What is the per cent of grain shipped to those points that is not used by the distilleries?

Mr. GOODWYN: I don't know. I would not only have to find out the per cent that is shipped to those points, but to the intermediate points also. And if you were to order me to restore these rates on grain for distillery purposes, the next thing would be an order from the Interstate Commerce Commission that I should apply them on commercial business.

Mr. FINN: I thought you said awhile ago that no grain was grown on the streets of Louisville, and that it all came into Louisville.

128 Mr. GOODWIN: Louisville is the largest grain market around here.

Mr. FINN: Will you prepare and file a statement showing the commercial grain shipped to these respective places on which these distilleries ask this remedy.

Mr. GOODWYN: I will have to take that up with our accounting department. You have got to examine every file to see how much there is, and you have to examine every waybill.

Mr. McCORD: Don't your local station agents' reports show that?

Mr. GOODWYN: No, nothing only the name.

Mr. FINN: I don't see how you can get at it unless you can have some relative statement as to amount of commercial grain shipped and amount of distillery grain shipped.

Mr. GOODWYN: You think you ought to hurt us?

Mr. FINN: I do not.

Mr. GOODWYN: We would have to take the files out of Louisville for whatever purpose the statement would cover and examine every waybill on it for that entire period, and take the cars of grain going to these various points. We could not always tell when it was going there for commercial purposes, because under our system of these net rates on all the bills are exactly the same rates. Mr. Miller might have corn shipped out home from Brandeis & Company to Chapeze, and he presents his document that was used in shipping whiskey, that the corn was used in the manufacture of whiskey, and we would refund to him on that. I do this to show 129 you how difficult it is to determine this matter.

Mr. FINN: Then your complaint is that you have to make this same rate on commercial grain, when, if I understand you, you do not know how much commercial grain you ship to these respective points.

Mr. GOODWYN: I know if 5¢ is a correct rate on commercial grain, it is correct on grain for distillery purposes. I have got to consider the entire wheat crop in Kentucky.

Mr. SILER: Also in this section.

Mr. GOODWYN: We feel this, that the difference between the rates that we charge on grain for distillery purposes and commercial purposes is a discrimination in favor of the distilleries. We have felt that it was not unjust discrimination. The Interstate Commerce Commission says it is. That does not affect it from Louisville. When we make it from Louisville, we ought in all honesty make it from Cincinnati, which supplies this portion of the line to a very large extent. You may say that we have only got to consider Louisville in this matter. What is just and reasonable in one case is just and reasonable in another. You may say I am not concerned in what the Interstate Commerce Commission may say. Mr. McChord is asking us to join him in the theory what you say to the Commission does concern. I think what you do concerns them—it certainly concerns us. If you want them to put this rate in at Louisville on distillery grain, we are compelled to accept that on all kinds of grain coming from points 130 beyond Louisville, and we are compelled to make them on other points.

Mr. FINN: Let me ask you— You state that the real question is: Is the 5¢ rate reasonable and just in and of itself?

Mr. GOODWYN: Yes.

Mr. FINN: And you affirm that it is not?

Mr. GOODWYN: Yes; I affirm that it is not in and of itself.

Mr. FINN: The question I want to ask is: Upon what do you base your judgment?

Mr. GOODWYN: In the first place that is materially less than is

paid on grain anywhere in the South; in the second place that is 30 to 35¢ per ton, which is less on grain than that which the Kentucky Commission ordered put in, which we did; it is less than on grain north of the Ohio River where the tonnage is four times as large as that of the south.

Mr. McCHORD: What is your rate from St. Louis to Louisville?

Mr. GOODWIN: Six cents. I can tell you just why it is in there. That is not a flat rate. It was put in to assist the manufacturers on our line to make something back, that would give us a haul in taking their products away.

Mr. McCHORD: Is not that the purpose here?

Mr. GOODWIN: Yes, and to give us more grain to haul at 5¢. The Commission is appointed to look after the interests of the L. & N. just as much as for the interests of the distilleries.

131 Mr. McCHORD: I was speaking about the purpose of these double hauls.

Mr. GOODWIN: What do we get on the other hand?

Mr. McCHORD: I don't know, you ought to know.

Mr. GOODWIN: It concerns us, and from the beginning constitutes the reason why we did not continue the old rate.

Mr. McCHORD: That don't help these people.

Mr. FINN: If 5¢. is a losing proposition to the L. & N., then the more you haul at 5¢. the more you lose. It looks to me like the question with you is the commercial grain hauled, and I think it is material that that should go in the record.

Mr. GOODWIN: I am free to say that what I am saying is practically the testimony I am going to give. I can show you how much we haul of grain in Kentucky. Kentucky gives us a good deal of grain.

Mr. SILER: This complaint does not reach to that, except as to fixing rate on grain.

Mr. GOODWIN: I am trying to tell you what it is going to lead to. What would you say if I charged 5¢. per 100 pounds from here to Lancaster, Kentucky, on grain and 9¢. per 100 pound from Lancaster to Louisville? You would say we ought to make it 5¢. from Lancaster to Louisville, and you would be right.

Mr. FINN: If the Commission should charge you with that condition I can anticipate what you would say.

Mr. GOODWIN: I would say you ought not make me take 5¢. from Lancaster to Louisville. I was compelled to take 5¢. from Louisville to Lancaster under different conditions. Mr. Finn 132 might not make me do that, but some one else might. For instance, from Chicago to New York the rate on grain is reduced because the ice has moved out of the lakes and rivers and the boat competition is to be considered, and the rates are reduced on that account in the North, and say from McKinney, Texas, to Boston on cotton. \* \* \* I think I have reason to fear the effect on what is going to take place if this is to be done in this case.

Mr. SILER: Did the Supreme Court hold in its opinion that this is the proper way to take up these rates—not as blanket rates?

Mr. GOODWYN: If you can show me how we can do this, or if Mr. McChord can show us, without its affecting any of our revenue, why we will be glad. We don't think we should be deprived of these revenues which we are entitled to. If we could have known how to accomplish this, then all this trouble would not have been necessary, and I would have put the rates in, as I told Mr. Miller. \* \* \*

Mr. DEARING: I want to supplement his remarks a little. The case to which he refers is a case of rates on brick. The railroad company made a rate on brick for certain purposes and that rate was contested before the Interstate Commerce Commission and that Commission said a brick is a brick and you can not discriminate against its users. The Kentucky Court of Appeals said you can have this rate on coal for steam purposes and another on coal for domestic

purposes. Here is a difference on steam coal and domestic  
133 coal—if it was interstate business, you could not make dif-

ferent rates on coal. In Kentucky if it be purely intrastate, it is different. The penalty has always been you have to charge less for any commodity coming from beyond the Ohio River crossing than for anything originating at its crossing. How does the Interstate Commerce Commission fix interstate rates to destination in the State. It gets the rate up to the Ohio River plus the rate from the Ohio River crossing to the point of destination. So far as any interstate rate is concerned it is uniform in that you can only have one rate on a commodity and you can not discriminate on that rate for the purpose for which that commodity is to be used. There are hundreds of thousands of bushels of grain brought into this State, and if you compel us to lower the rate here at Louisville to these various points, then you compel us to lower our revenue all over our line. The Long and Short Haul provision says that, and the Interstate Commerce Commission says certain things. The case of Siler and others v. L. & N., decided that you had to bring up a particular rate—you could not have a blanket rate in that particular case.

Mr. SILER: The claim you have, that will come up for us to determine whether it affects the revenue so that you can not afford to do this.

Mr. DEARING: If you lower the rate to less than what is reasonable per se, can the L. & N. in the State of Kentucky do this? It is to your interest to look after the L. & N. as much as the shippers. We think we can show you that the rate in itself is reasonable. It has been the desire of the L. & N. to foster the industries along  
134 its line—it likes to see industries spring up on its line of road, it gets rates on the incoming and outgoing commodities and it is willing to help such industries in getting established. That is the way railroads do to get revenue. It has gone to the place where if the change has to be made, it was made. It was decided in the Cotton Seed case that where a rate is in effect for a number of years, that fact of itself does not show on its face the reasonableness of the rate. Now here is a rate that has been in effect for 30 years, and yet the Interstate Commerce Commission says it was reasonable and right. The question will come up whether they are

reasonable in and of themselves. If this can be shown, all right, but all the points are to be taken into consideration in this case.

Mr. SILER: Gentlemen, have you any witnesses to introduce in behalf of your contention?

Mr. McCHORD: I want to introduce Mr. Miller as a witness on behalf of the complainants.

(Mr. Siler at this point swears each of the witnesses for both plaintiffs and defendant.)

W. A. MILLER.

Direct examination by Mr. McCHORD:

Q. 1. What is your business, Mr. Miller?

A. Distilling whiskey.

Q. 2. What is the name of your firm?

A. Wright & Taylor.

Q. 3. One of the complainants?

A. Yes, sir.

135 Q. 4. Where located?

A. At Chapeze, on the Bardstown branch, 24 miles from Louisville.

Q. 5. What size place is Chapeze?

A. Very small outside of the distillery. The distillery about composes the whole place.

Q. 6. It is a grain producing part of the State?

A. Some grain.

Q. 7. Are there any other manufacturers or industries there?

A. No, except a cooper-shop, which we own and run in connection with the distillery.

Q. 8. When did your firm acquire that distillery?

A. In 1896.

Q. 9. What rates were in effect at the time you acquired that property?

A. I don't know that I can state just now.

Q. 10. I hand you copy of Exhibit "A" which shows certain rates in black ink and certain rates shown in red ink, and you can perhaps state from that?

A. I am not certain whether these grain rates are exactly the same, but I know they were considerably reduced from the regular rate. I think there was a rate of 5 cents on grain in January, 1897, when we first bought grain. I am not positive, but we have had several reductions on different products at different times, and I am not sure whether we enjoyed a 5-cent rate on that date or not.

Q. 11. Have the investments made by your Company in this plant been large or small?

136 A. Very large compared with what was there when we bought it.

Q. 12. About how much has been your investment since you bought the distillery, not including the purchase price?

A. About \$75,000.00.

Q. 13. How much grain do you transport from Louisville to your distillery?

A. We mash 400 bushels per day and run from six to seven months each year—that would be about 60,000 to 75,000 bushels per year.

Q. 14. What other commodities do you use as distillers?

A. Barrel materials, boxes, bottles, machinery, building material and coal. I think that is all.

Q. 15. Use any malt?

A. We include that in the grain.

Q. 16. These rates, I believe, have all been increased on the 25th day of March, 1910?

A. Yes, sir.

Q. 17. What was the former rate, and what is the increased rate?

A. Former rate 5 cents and present rate 8 cents per 100 pounds.

Q. 18. I believe I asked you whether or not there was any other industry at that place using these same commodities?

A. No, sir, there is not.

Q. 19. What is the practice of distilleries with reference to the sale of their product? Is it made in advance of the manufacture of whiskey?

A. The usual custom, or the common custom is to sell a crop of whiskey, or a certain number of barrels, to be made, sometimes several seasons ahead.

Q. 20. Are those contracts made with reference to freight rates in making the price on the whiskey?

A. Yes.

**Mr. DEARING:**

Q. 21. Do you pay the freight rate to the purchaser, or does the purchaser pay that?

A. The purchaser. In this case our distributing house is in Louisville, deliveries are made from Louisville. We ship f. o. b. Louisville. We pay the freight from the distillery to Louisville on everything.

**Mr. McCORD:**

Q. 22. Prior to March 25, 1910, have you paid anything on grain higher than 5 cents?

A. Not to my knowledge.

Q. 23. What effect has this increase in rates, as shown by Exhibit "A," had on your distillery, and what will be the effect on the other distilleries?

A. It will make it impossible for some of us to compete with the distilleries at Louisville who have no freight, outgoing or incoming, to pay. We thought we had a little the advantage by being in the country where we could get pure water and air, and we would have had to pay city taxes in Louisville, which the old rate about compensated, but now it proves to — a disadvantage to us.

138 Mr. McCHORD: Judge Dearing, this letter of Mr. R. L. McKellar's representing the rates on the Southern, and which has been agreed might be filed, we would like to introduce that in the evidence with the Commission and file it.

Mr. DEARING: That is all right.

Mr. McCHORD:

Q. 24. Mr. Miller, what is the distance from Louisville to Chapeze where your distillery is located?

A. 24 miles.

Q. 25. I notice on the Southern Railway in Kentucky from Louisville, to Lawrenceburg and Harrodsburg the distance is from Louisville to Lawrenceburg 63 miles, and from Louisville to Harrodsburg 84 miles, and I observe the grain rate to those two points, and, I believe, to all immediate points on the Southern, is 5 cents per 100. In what attitude are you when you come to compete with those distilleries who get that 5-cent rate?

A. We are at a disadvantage. They can make whiskey at a lower figure than we can.

Q. 26. The Southern Railway, I believe, is a competitor of the Louisville & Nashville Railroad Company?

A. Yes, sir.

Q. 27. And the same circumstances apply to all other commodities used in a distillery as apply in that letter from Mr. McKellar?

A. Yes.

Mr. McCHORD: Is there any question made as to the amount of those claims?

Mr. GOODWYN: We never checked them.

139 Mr. DEARING: My idea is that the Commission can easily check them, and you and I can check them if we come to the position that they are entitled to the reparation.

Mr. McCHORD: You deny it all.

Mr. DEARING: Yes.

Mr. McCHORD: I will put all these claims in as exhibits. Some of these have not been made up by the complainants, and we will want to fill them in later.

Mr. DEARING: That will be all right.

Mr. McCHORD: Shall I put them in now?

Mr. SILER: Yes, or any time.

Cross-examination by Mr. DEARING:

Q. 28. Mr. Miller, where do you get all your grain with which you make whiskey?

A. We buy it in Louisville. We buy malt away from Louisville, and have bought some rye, but the last two seasons we bought all our corn and rye in Louisville.

Q. 29. How much wheat?

A. We do not use wheat.

Q. 30. Do you buy any in that neighborhood?

A. We do not buy any in the neighborhood.

Q. 31. What would be the difference between the old rate and the increase you have to pay on grain from Louisville?

A. It would amount to about \$2,500.00 or \$3,000.00 a year.

Mr. GOODWYN:

Q. 33. Mr. Miller, you say you bought your distillery in 1896?

A. Yes, sir, that is when we bought it.

140 Q. 34. It was built by Thomas Moore?

A. By —. We bought it from Mr. Moore.

Mr. GOODWYN: Mr. Miller states that so far as he knows they have been paying a 5-cent rate. That is not correct. He paid 7 cents from here to Chapeze until 1899—throughout the season of 1899 the full rate being 8 cents. He paid 7 cents when he bought it.

Mr. MILLER: In my answer I believe I stated that as far as I remember it had been 5 cents.

Mr. DEARING: You paid 7 cents up to 1899.

Q. 35. When you bought that distillery did you buy it upon the condition of freight rates that existed at that time?

A. Not because of the 7-cent rate, on account of the reduction of rates.

Q. 36. Were you ever promised a continuance of those freight rates by the L. & N., except from year to year?

A. Not from any promise by the railroad, but we got together and put improvements in to about \$75,000.00, thinking the freight rates would be continued as they were.

Q. 37. How much whiskey do you manufacture each year?

A. From 6 to 7 thousand barrels a year.

Q. 38. Worth about what?

A. Different prices, according to age. I could not state without giving away some little trade secrets.

141 Q. 39. You say you manufactured from 6 to 7 thousand barrels each year?

A. Between 6 and 7 thousand.

Q. 40. Barrel containing how much?

A. When made, 48 gallons.

Mr. GOODWYN:

Q. 41. Whiskey is pretty cheap. Whiskey that does not bring further than \* \* \* \$2.00?

A. Oh, no, that is the tax, \$1.10, the whiskey that is sold is in bond. The average price is 40 cents.

Q. 42. You don't mean to say our freight rate ought to increase under your tax. You produce from 6 to 7 thousand barrels a year and that it runs about 48 gallons to the barrel—certainly it is worth more than the tax of \$1.10 a barrel, or gallon, I mean. Putting 40 gallons, even, at \$1.50 per gallon it is worth \$60.00 a barrel at least, so you produce from your \$75,000.00 investment somewhere in the neighborhood of \$360,000.00 or above annually. You bought that distillery when you were paying a 7-cent rate on your grain. In

1899 we reduced that to 5 cents. How much does that change cost on each gallon of whiskey?

A. Do you mean the 2 cents or 3 cents difference?

Q. 43. I mean the 3 cents, the outside figure.

A. I could not answer that question off-hand.

Q. 44. You don't know how much this change affects you in the cost of a gallon of whiskey?

A. We have not closed our books since March 25th, and we could not compare the books for a part of a season—we enjoyed the low rate part of the season. After the next season I could ascertain how much the change affects us on each gallon.

Q. 45. Formerly we hauled coal for you to Chapeze and refunded to you on a certificate?

A. Yes.

Q. 46. And we advanced that rate?

A. Yes, we are now paying 30 cents per ton.

Q. 47. You say you sell your crops of whiskey sometimes several seasons ahead?

A. That is the custom of some distilleries.

Q. 48. Do you know to what extent this paramount freight rate cuts on the figures that they estimate they are going to pay for grain?

A. They pay 40 and 30 cents if the contract is based on the price of grain, sometimes they make a flat price of one or two seasons.

Q. 49. You said in answer to another question that Mr. McChord asked you, or Judge Dearing asked you, that the effect of this amounted to about \$2,500 a year. I will put it in evidence that we have paid Wright & Taylor a refund of \$3,517.34 for five years, an average of \$703.40 per year.

A. I will state further that originally our plant was about one-half the capacity that it now has, and we are making the double quantity of whiskey we did 2 or 3 years ago. Of course, Mr. Goodwyn has the advantage of the figures.

Mr. GOODWYN: I am trying to show that it does not amount to as much as you think it does. That is why I am trying to get the cost per gallon, and that is the reason why I limit the price 143 at 30 cents bushel on corn. The price of corn has been affected greatly.

Mr. DEARING: Let him state the price of corn.

Mr. SILER: I don't see that would have anything to do with it.

Mr. GOODWYN: Assuming that he produced 6,000 barrels a year five years would be 30,000 barrels, and assuming my statement to be correct that we have paid Wright & Taylor a refund of \$3,500.00 in that five years, how much would that be per barrel that this refund has amounted to that we have paid Wright & Taylor.

A. It would not amount to more than 20 cents a barrel. 20 cents a barrel, and he charges us 25 cents in barrel lots to Louisville, that makes 45 cents a barrel that we paid him that other distilleries in Louisville are not compelled to pay. That is the point we have been contending. We can not compete with the distilleries on the river who do not have to pay the local freight in and out of Louisville.

Q. 50. When you bought that distillery you knew you had to ship your grain in, didn't you?

A. A good many years ago we had an ambition to own a distillery and we bought this little flint lock plant, never expecting it to amount to much. We could make a few hundred barrels, but the thing grew and we got after the L. & N., and two other distilleries, and got this rate put in—and they said they did this to foster these plants, to build up improvements and to make large industries, which they have done. Now we have built up this industry and they want to withdraw these rates and break this industry down—they do not want to do that, but that is what they will do, and they will destroy a great many. In fact there is one distillery which was being considered by a man who wanted to establish one near Bardstown, but when this rate was canceled he decided not to buy the distillery.

144 Q. 51. When you bought the distillery at Chapeze you knew you would have to pay freight rates over and above the freight at Louisville?

A. Yes.

Q. 52. You knew you would have to pay a rate on whiskey from there to Louisville?

A. Yes.

Q. 53. You went into the business with your eyes wide open. I suppose you are aware of the fact that distilleries at Louisville pay more for corn than the man does in Indiana?

A. We don't know that.

Q. 54. You think because you had an ambition to own a distillery, and indulged in that ambition and bought the distillery, that we ought to risk the consequences?

A. No, sir, I do not think that.

Mr. DEARING:

Q. 55. Does labor cost as much out there as it does in the city?

A. Yes, more.

Q. 56. Why?

A. It is not as efficient.

Q. 57. What do you pay men per day?

145 A. Distillers will get as much there.

Q. 58. What do you pay for unskilled labor?

A. \$1.50 for unskilled laborers. Engineers get \$18.00 a week. We pay our distiller \$150.00 a month.

Q. 59. You have to pay no city taxes?

A. No, state and county.

Q. 60. In the city you would have to pay city, State and county taxes?

A. Yes, but no freight rates.

Mr. McCORD:

Q. 61. Have you any objections to stating what you paid for your distillery when you bought it?

A. About \$6,000.00.

Q. 62. Bought that in 1896?

A. Yes, sir.

Q. 63. The improvements that have been made, were they made prior to 1899?

A. The bulk of them has been subsequent to 1899.

Mr. GOODWYN:

Q. 64. There was no promise that the 5-cent rate would be continued?

Mr. SILER: He has answered that.

Mr. GOODWYN: I want to repeat that. I want to make it clear that there was no promise made to continue it.

A. There was no promise to discontinue it.

Direct examination by Mr. McCHORD:

Q. 1. You are in the distilling business, Mr. Brown?

A. I am President of the Brown-Forman Distilling Co.

Q. 2. Located where?

A. In Marion County, near St. Marys.

Q. 3. You have no distillery on the Southern?

A. No.

Q. 4. Does the increase in freight rates apply to your distillery?

A. I understand there is to be an increase in freight rates. We did not operate in 1910. I have heard there is to be an increase from 6 to 11 cents, if I understand correctly. I would like for Mr. Goodwyn to confirm that.

Mr. GOODWYN: The class rate is 11 cents—I think I told them the other rate.

Mr. McCHORD:

Q. 5. These are the rates that apply at St. Marys?

A. We have not shipped any out of there this season. The rates, if I remember correctly, had been 6 cents all the time since we have been interested there.

Q. 6. When did you acquire that property?

A. In 1902, and made the first crop in 1903.

Q. 7. Those freight rates were in effect when you went there?

147 A. The same rate has been in effect all the time. We have not had any personal experience with the increased rates.

Q. 8. What size place is St. Marys?

A. I suppose about 100 people.

Q. 9. Any other manufacturers or industries?

A. I think they had a butter plant, but it was a failure.

Q. 10. Have you any objections to stating the amount invested at that place by your firm?

A. My recollection is that we paid four or five thousand to start on. It was nothing but a shell, and we have been putting in im-

provements—anyhow \$50,000.00—at various times and in various ways.

Q. 11. Do you sell your whiskey prior to making it?

A. We really sell it to the Brown Wholesale Co.

Q. 12. That is done prior to time you make your whiskey?

A. I can not say that it is, but it is understood that they will buy it.

Q. 13. Tell the Commission what effect this increase will have on your plant?

A. If the rate is, as I have understood, to be increased to 11 cents, that would be an increase of 83 1/3%, in other words, it would increase on an average of 50 cents a barrel for the cost of producing our whiskey. Say it is an increase of 5 cents on 100 pounds, and assuming it takes 10 bushels of grain to make a barrel of whiskey. That would be an increase, assuming an increase of 60 pounds

on 600 pounds, 600 pounds at 3 cents would be 18 cents per 148 barrel increase in the cost of freight. The last season we

operated there we made about 4,000 barrels, and estimating the increase in rate on that amount would be \$720.00 a year increase.

Q. 14. Why do you say 3 cents?

A. The increase is 5 cents, but it is 3 cents a bushel on the grain, that would be 30 cents a barrel on 4,000 barrels, or an increase of \$1,200.00, and the value of the output of that distillery, taking the last year as a precedent, would be in the neighborhood of \$60,000.00. An increase of 30 cents on the barrel is a positive tax on the product of 2% on the selling price. 2% is often considered a good profit. When you realize that it becomes an actual tax, we can not compete with the other distilleries that do not labor under the same circumstances. As an illustration, take Harrodsburg, which is 83 miles from Louisville, 23 miles further than from St. Marys, and it has a rate of 5 cents on grain. Now, assuming that that rate would be increased only to 10 cents instead of 11 cents, Harrodsburg has an advantage over us on freight of 100%, and they claim they can make as good whiskey as we can. It really comes down to the commercial value, and because one happens to be located on one road and one on the other, and the one that is located where it gets a lower rate, why of course it is to a decided advantage and puts them in a position where they can compete with any distillery. I am free to say that I would never think of locating there if it was a new proposition. Assuming that we have an output of \$60,000.00

149 a year, here is a positive tax over what we made last year of 2 cents. We are put to a 2% disadvantage over those distilleries on the Southern road each year.

MR. GOODWIN:

Q. 15. What do you mean by a 2% disadvantage?

A. 2% on selling, or a disadvantage on grain rates.

Q. 16. Do you mean to say the grain that goes into the manufacture of 4,000 barrels of whiskey at an increase of 4 cents on 100 pounds freight rates, represents 2% of the value of your output.

A. Of 4,000 barrels as it is made. The Brown-Forman Company

never has sold tax made whiskey. I am putting that at \$15.00 on 4,000 barrels, would be \$60,000.00, and this proposed increase would be \$1,200.00—\$1,200.00 is 2% of \$60,000.00. That is the tax that we labor under. I think that is a mistake on the part of the railroad company, and I think they are killing the goose that is laying the golden egg.

Mr. GOODWYN: I don't think there is any geese in the crowd.

Mr. BROWN: You want to put the government taxes on it?

Mr. GOODWYN: I don't want you to conduct your business at my expense.

Mr. McCHORD: You mean at the expense of the L. & N.

Mr. GOODWYN: Well, we are in the habit of expressing ourselves in that way.

150 Cross-examined by Mr. GOODWYN:

Q. 17. Now you have intimated that you would have to pay \$1,200.00 freight rate—additional freight rate of 4 cents per 100 pounds.

A. I think I based it on 6 cents.

Q. 18. Put it on 5 cents, and assuming there is 1,000 bushels of corn in a car, weighing 56,000 pounds, the freight rate then is \$28.00 per car, that is additional freight rate. Now in order for it to amount to \$1,200.00 how many cars of grain would you have to get?

A. As often as 28 would go into 1,200—about 43 times.

Q. 19. At 5 cents per 100 pounds is a difference of 2.8% per bushel.

Q. 20. The Brown-Forman Company is different from the Company at St. Marys?

A. Yes.

Q. 21. You keep your books separate?

A. Yes.

Q. 22. The Distillery Company has sold to the Brown-Forman Company its crop of whiskey in advance of its being made?

A. Not necessarily.

Q. 23. Well have you?

A. We have not this year.

Q. 24. Do you know it to be a fact that any of them—the distilleries—sell their crops in advance?

A. Yes, that is very usual.

151 Q. 25. Have you ever known cor n to vary or advance 2.8% per bushel?

A. Yes.

Q. 26. More than 2.8?

A. More than 5—more than 10. It is a serious matter to trade when that will amount to more than 20 cents a barrel. It is a serious matter when it amounts to 80 odd cents in freight rates. People have considered that when the railroad had had a certain rate in effect for a number of years that it was not losing on it and naturally had a right to suppose that it would remain in effect.

Q. 27. Of course you could not testify to it, but I can, that under no circumstances has the L. & N. guaranteed that a rate will be continued beyond a certain time, and if you based your calculations on something like that, that was your own risk, for the L. & N. has never held out that it would carry its rates longer than from season to season.

A. When a custom has been established for several years, say where it has been continued for 15 years profitably, it should not be lost sight of so arbitrarily.

Q. 28. I don't think the custom has been arbitrarily lost sight of in the sense that you have used the term "arbitrarily," but on the other hand, it has been a last resort?

Mr. SILER: Gentlemen please confine yourselves to the main facts in the case.

Mr. McCORD:

Q. 29. The gentlemen on the Southern Railway who are 152 operating at Harrodsburg and Lawrenceburg are your competitors, are they not?

A. Yes.

Mr. DEARING:

Q. 30. Don't they buy their corn in that neighborhood?

A. I think not.

Q. 31. Is that not in the Bluegrass section, and is not that a corn and wheat producing section?

A. I have heard of the distillers at Harrodsburg buying corn at Louisville.

Q. 32. You don't know that they come to Louisville to buy all their grain?

A. I don't know, the quantity fixes the rate.

Q. 33. While as a matter of fact you compete with them, and you can not say you are put to a disadvantage because they have a 5-cent rate and you have a 11-cent?

A. You ask me a question I can not answer it definitely, as we have not operated since the new rate took effect, but naturally I would say that we would be to a disadvantage.

Q. 34. Your answer is a supposition that it does.

Mr. McCORD: Mr. Davis Brown is here and we will ask him relative to that.

Mr. DEARING:

Q. 35. What was the price of corn about 5 years ago—not over 30 or 40 cents?

A. I don't think corn has been that low for some time. I should say it was under 50 cents.

Q. 36. Now it is 70 and 80 cents?

153 A. Yes.

Q. 37. A difference of 20 cents between then and now.

Mr. GOODWYN:

Q. 38. Is there any difference in your selling price of your product at that time and now?

A. Yes, necessarily.

Q. 39. Higher?

A. Yes, sir.

Mr. McCHORD:

Q. 40. Any difference in the volume of business done by the L. & N., in its revenue than it was five years ago,

A. I should imagine there is, though I am not bookkeeper for the railroad.

Adjourned until 2 o'clock p. m.

Mr. SILER: Gentlemen, we are ready to proceed with the case, call your next witness.

DAVIS BROWN.

Direct examination by Mr. McCHORD:

Q. 1. Are you a member of the firm of J. T. S. Brown & Co.?

A. Yes.

Q. 2. Engaged in business at what place?

A. McBrayer, in Anderson County, on the Southern Railway.

Q. 3. How far is that from Louisville?

A. 65 miles.

Q. 4. Examine this quotation of rates and see if those are the rates applicable on distillery supplies at McBrayer and Lawrenceburg?

A. They are the same.

Q. 5. Examine Exhibit "A," the black figures representing the rates prior to March 25th, and red figures the new rates, and state if the black figures represent the old rates?

A. Yes.

Q. 6. In your opinion, what would be the effect on the distilleries at these various points in competing with your distillery with respect to freight rates?

A. I figured very carefully the freight rate cost of producing whiskey in the country as against producing in the city, and the rates which have been in on the Southern and the L. & N., which have been practically the same, there is a difference of about \$1.00 on the barrel on country product and city product, in the city of Louisville. There is a difference on grain rate of about 35 cents per barrel, and a difference in getting our material and supplies, empty barrels, etc., that figures up the difference of about \$1.00 a barrel. We have a grain rate of 5 cents; and those rates are correct rates on boxes, empty barrels, etc. If the L. & N. would say that they had to raise the rate to 10 cents, why, we would tear it down. We could not afford to operate at such a rate.

Mr. DEARING: I move that this be excluded from the record.

Mr. BROWN: He asked me what the effect would be, and I answered as I understood it.

155 Mr. FINN: The question is the reasonableness or unreasonableness of the rates. If the rates are such that it would be injurious to their business, that would tend to show the unreasonableness of the rates.

Mr. DEARING: Now if they would tell me if I was going to do so and so that they would do so and so. Now he might say he thought the rate was reasonable, but that is the argument I would make, that is purely argument, but the commission has ruled on it.

Mr. BROWN: I was asked the question what effect I thought that would have. I know what effect it would have on me.

Mr. McCHORD:

Q. 7. Is it a fact that any of the grain or distillery supplies is bought out in the country, or by any distillery on the Southern?

A. There is not a distillery on the Southern that buys one bushel of grain there, it is bought in Cincinnati or Louisville, without a single exception. I know they don't get a single bushel from the country.

Mr. DEARING:

Q. 8. That is a farming country—they produce grain there, don't they?

A. Anderson County does not raise enough corn to run a distillery one day.

Cross-examination by Mr. DEARING.

Q. 9. When did you buy your distillery?

A. In the fall of 1894, from Wal— & Frazier.

Q. 10. How long has it been located there?

156 A. A great many years—when was the Southern Railway completed?

—. I should judge about 1880.

Q. 11. Was the distillery there prior to that day?

A. Yes, a very small house.

Q. 12. Has Lawrenceburg been the home of distilleries?

A. Yes, for many years—not every one is exceptionally small.

Q. 13. I am not asking you that. How did they get their grain?

A. Over the L. & N. by Frankfort and hauled out.

Q. 14. Get any from the river?

A. Possibly.

Q. 15. How many distilleries at Lawrenceburg—more than there are now?

A. I should judge 10 distilleries around Lawrenceburg prior to the building of the railroad, 10 or 12.

Mr. GOODWYN:

Q. 16. How far is Lawrenceburg from Tyrone?

A. Seven miles.

Q. 17. It has distilleries?

A. Three.

Q. 18. Get grain by the boats by river?

A. Not a grain. Absolutely not at all.

Q. 19. Do they take any of their product out by river?

A. They don't ship their whiskey out by river on boats. They do not carry whiskey by river. They did prior to the railroad being completed. There is no reason why they should, they have 157 a 40-cent rate and it is practically as cheap as river rate of 10 cents per 100 or 40 cents per barrel.

Mr. GOODWYN: I am not able to testify to it, but I have understood that the river does not bring whiskey into Tyrone.

Q. 20. Your rate from Lawrenceburg on whiskey is 18 cents in car lots, in glass, and 25 cents in less than car lots.

A. That is not in glass.

Q. 21. You are asking them to reduce the rates?

A. Yes, Lawrenceburg has reduced rate on grain, and the L & N. is asked to give that rate.

Q. 22. Are your distilleries on the L. & N.?

A. No.

Q. 23. Then what are you asking for?

A. I am just a witness in this case.

Q. 24. You are not a party to this complaint?

A. No.

Q. 25. You have no distilleries on the L. & N.?

A. No.

Q. 26. You have no personal experience with these rates complained of?

A. No, sir.

Mr. SILER:

Q. 27. How much grain is shipped into Lawrenceburg outside of grain for distilling purposes?

A. Practically none, except some for milling interests, wheat for milling, but the corn amounts to nothing.

158 Q. 28. Is the amount of wheat of much importance?

A. Very small item.

Q. 29. You are well acquainted with the situation at Lawrenceburg?

A. I am.

Q. 30. You know the wheat interests and corn interests?

A. Yes.

Mr. McCORD:

Q. 31. This 5-cent rate to Lawrenceburg and Harrodsburg applies to all shipments of grain?

A. I think so.

Mr. McCORD: Mr. Behring, does this rate apply to all shipments of grain at Harrodsburg and Lawrenceburg?

A. Any one who wants to ship grain at Harrodsburg and Lawrenceburg goes in on the 5-cent rate.

JOE KERNS.

Mr. McCHORD:

Q. 1. What is the name of your firm?

A. S. Grabfelder & Company.

Q. 2. Where is your distillery located?

A. Clermont, Murphy, Barber & Co. Distillery.

Q. 3. Where is Clermont from Louisville—how far?

A. 25 miles.

Q. 4. What is the population of Clermont?

A. I think it embraces the people that work in our distillery, outside of one or two storehouses.

159 Q. 5. What is the volume of business done by your people?

A. Up to 1909 we made an average of 3,900 or 4,000 barrels. This year we made slightly in excess of 7,000—I think 7,013. I think our distillery closes the first week in June.

Q. 6. When did you begin operation?

A. About 6 months—I didn't look up the figures.

Q. 7. I mean when did you first begin operation?

A. It was purchased in the fall of 1899, is what I understand. I was not connected with the firm, but these points are furnished me by the people in the house.

Q. 8. Was the same rate in effect when you began business as that prior to March 25th?

A. From the information furnished me by the traffic man it is the same.

Q. 9. Very small or large plant when you began business there?

A. Very small—it could not have cost over \$10,000.

Q. 10. And what is your investment in that plant now?

A. Easily \$75,000 00.

Q. 11. Would you have made this large expenditure of money on improvements there if you had thought the rate was to be increased?

A. We certainly would not.

Objected to by Mr. Dearing; objection overruled.

Q. 12. What is the effect on your distillery by reason of this increase in rates?

160 A. It places us to a disadvantage against our competitors.

Q. 13. Competitors receiving lower rates can sell their product at a better advantage?

A. Yes. I figure on the distillery products they are charging about 2%—I think the figures furnished by Mr. Brown are correct. That is very easily ascertained.

Q. 14. Well, let's see how you get at that?

A. The average price on all grain say that enters into the making of whiskey, corn, which has been about 65 cents, malt something like 70 odd cents, rye average of 80 to 90 cents, I would put the average price about 70 cents. If we were advanced from a 5-cent

rate to an 8-cent rate, a difference of 3 cents, figures 2-1/10, if the average yield is 4½ gallons per bushel, that would be 2-1/10 of 4-5/10, and if there is 48 gallons to a barrel, I would then multiply 2-1/10 x 48 and divide by 4-5/10—think you would find that the exact figure. That would bring a barrel down to about 21 cents or 22 cents a barrel. If we were making 7,000 barrels that would make \$1,540.00 on whiskey alone, and we have other supplies on which we are paying, and I figure they would foot up about \$2,000.00 in all. I think 2% is quite a large item. It strikes me that we are put to a very great disadvantage when it comes to competing with the distilleries at Louisville, and I think this raise made by the L. & N. will work a hardship on all the distilleries on its line, and had we have known of these advances it would have weighed heavily with us in the purchase of the distillery.

161 To verify as to these figures, I have looked up some data since I was in here. In 1909 we had a refund of \$839.00, and we made between 3,900 and 4,000 barrels, and with double the capacity it will amount to \$1,800 to \$2,000 a year refund.

Mr. GOODWYN: We have paid you \$2,000.00 within the last 5 years.

A. We have a much larger plant than then.

Q. 15. These are the exact figures taken from your receipts on grain, staves, heading and bottles.

A. Our bottling has increased 25% in 1910 over 1909.

Q. 16. On all those commodities it effects your distillery?

A. We think so.

Mr. SILER: What is the amount of grain shipped out to your place that goes to other interests aside from the amount which is used in the manufacture of whiskey?

A. I don't know of any other, unless they feed some to chickens, or a horse that goes out to a country store. So far as shipping grain from that point is concerned, if they can raise anything on that land they can do more than I think they can. We just purchased 125 acres around there, but don't think it is fit for anything except to be used for the purpose of enclosing our premises.

Mr. GOODWYN: I don't think we make any contention that these distilleries buy any grain in this vicinity, and we have not raised the question. I want to ask why we have not had any witnesses from any other place except these little distilleries. Why the peculiarity of the complaint is so apparent, I would like to know 162 why the Kentucky distillery warehouses are the only complainants.

Mr. McCHORD: Certain people employed Mr. Norman and myself to represent them in the matter of rates here.

Mr. McCHORD:

Q. 17. What is your principal commodity on which you have this increased rate to Clermont?

A. Principally corn. We buy all our corn in Louisville.

Mr. GOODWYN:

Q. 18. You say you estimate this discrimination at 21 cents a barrel?

A. Yes.

Q. 19. How many gallons in a barrel?

A. 47 or 48.

Q. 20. At 21 cents a barrel how much is that per gallon?

A. About  $\frac{1}{2}$  cent. We sell goods under so much in bond—I think about \$15.00 a barrel.

Q. 21. That is in the neighborhood of 35 cents a gallon?

A. Yes.

Q. 22. If a gallon is worth 25 cents, and if this rate affects the price  $\frac{1}{2}$  cent on the gallon, how is that 2%?

A. 35 into  $1\frac{1}{2}$  is about—you might say  $1\frac{3}{4}\%$  and the other  $\frac{1}{4}$  is made up of other supplies which we use.

Q. 23. You make 7,000 barrels, that at \$15.00 barrel, or 35 cents a gallon, is \$105,000?

163 A. We have paid out close onto about \$1,800 or \$2,000.

If that is not correct as to 2%, it might be 1.90%.

Q. 24. I just wanted to see how it would make 2%.

Mr. SILER: That is not necessary.

A. We had refunded to us last year \$839.00, and we made between 3,500 and 4,000 barrels of whiskey. Let's figure for 1909.

Let's figure on the other years. If we are going to figure on the rate we have had for years in effect, let's figure on what you have been making for those years.

Q. 25. You say it amounts to a serious handicap in competing with the concerns at Louisville?

A. Yes.

Q. 26. Do you think we ought to make you a freight rate that would enable you to compete with other distillers? Do you think there is anything in the law that would compel us to make a freight rate so that you would be in a position to compete with other distillers?

Objected to by counsel for complainants.

Mr. GOODWYN: As I understood it, he made the point that this advance in the freight rate seriously crippled his ability to compete with distillers in Louisville, and I am asking if he thinks we ought to be compelled to put him in a position to compete with Louisville.

164 A. As I understood, when this distillery was acquired, we were to have certain advantages, slight advantages, over Louisville only in the way of city tax, but this is greatly overcome by your freight rates going and coming, and we are virtually down to a disadvantage when we come to compete with Louisville by reason of this increase.

Mr. DEARING:

Q. 27. Your main contention is that this rate should not be advanced, that it ought to remain as it was. You think it is the duty

of the railroad to always put you in a position that you can compete with others?

A. We feel that you are charging extraordinary rates when you raise the rate from 5 cents to 8 cents.

Q. 28. Do you think the railroad company should make such a rate as would enable you to compete with Louisville?

A. No, I think there are other points besides Louisville where there is whiskey being made, and I think this rate places us to a disadvantage with our competitors.

R. H. EDELEN.

Direct examination by Mr. McCHORD:

Q. 1. Mr. Edelen, you are engaged in the distilling business?

A. Yes, sir.

Q. 2. What is the style of your firm?

A. F. G. Walker Company, two distilleries at Bardstown.

Q. 3. How long have you been operating at Bardstown?

A. 24 years.

Q. 4. How does the rate in effect now compare with the rate in effect at the time you bought the distillery?

165 A. I think it is 3 cents above that.

Q. 5. What was the size of your distillery when you purchased it?

A. I think it was about a 200 bushel house.

Q. 6. Have you added to the plant?

A. Yes.

Q. 7. Has that been a large increase in the addition?

A. Yes, we have spent a good deal of money on improvements of the plant.

Q. 8. On which rate did you make the largest improvements?

A. We supposed the railroad company would allow the same rate to stand that was in—that is the rate that was in prior to March 25, 1910.

Q. 9. Would you have made those improvements except for the fact that the rate which was in effect at that time was the rate which you thought would remain in effect?

A. No. I have contracts that run for 7 years which I made on the face of that rate.

Q. 10. You made the price of your goods on that rate?

A. Yes.

Q. 11. What size place is Bardstown?

A. About 2,000 I should think.

Q. 12. How much grain other than that which is used for distilling purposes is shipped into Bardstown?

A. I don't suppose a carload during a year.

166 Cross-examination by Mr. GOODWYN:

Q. 13. You say you supposed the L. & N. was going to continue those rates which were in effect at that time?

A. Yes.

Q. 14. And you think we ought to be responsible for your supposition. It was all a supposition that you based your opinion on?

Mr. McCORD: He has not said that.

Mr. GOODWYN: Let me state just what the witness said. He said he supposed the rate was going to be continued, and that he had made contracts in advance for a year or two.

Mr. McCORD: For seven years, that he would not have made except for the rates which were in effect at that time.

Mr. GOODWYN: Mr. Edelen, you have not said it, but you think we ought to continue these rates because you had supposed that they would be continued.

A. We thought the railroad company was satisfied with the rates being charged.

Mr. GOODWYN: We are perfectly satisfied if the rates could be continued, but will you show us how this is to be done.

Mr. McCORD:

Q. 15. Mr. Edelen, you would not have made the improvements which have been made on your plant except for the fact that you thought the rate which was in effect would remain in effect?

A. No.

167 Mr. GOODWYN: Mr. McCord, you are trying to get the record full as to the extent of investments based upon a rate which was never promised to be continued. If I repeat a good many times, why the repetition will not be one-sided.

Mr. McCORD: We concede that you did not make any contract to keep the rate in.

Mr. GOODWYN: Well, I don't know why you make the repetition.

Mr. McCORD: Simply because these men went on and made these investments and improvements they had a right to suppose that you would keep the same rate in effect, inasmuch as such rate had been in effect for years, they could see no reason for such change.

Mr. GOODWYN: I don't know why they had a right to suppose it on anything which might arise. We should not be responsible for their supposition.

Mr. McCORD:

Q. 16. The distance from Louisville to Bardstown is what?

A. 39 miles.

Q. 17. Do you ship your grain from Louisville to Bardstown?

A. Yes, sir.

#### G. McGOWAN.

Direct examination by Mr. McCORD:

Q. 1. What position do you hold, Mr. McGowan?

A. Secretary and Treasurer of the Greenbrier Distillery Company.

168 Q. 2. Where is your distillery located?

A. Greenbrier, Kentucky.

Q. 3. How far from Louisville?

A. 46 miles.

Q. 4. How long have you been operating there?

A. Since 1891.

Q. 5. What size plant did you acquire?

A. We erected a plant of 240 bushels capacity per day.

Q. 6. Examine this Exhibit "A" which shows the old rates prior to March 25th and the new rates which have gone into effect. The black figures show the old rates. Are those the rates which were in effect prior to March 25, 1910?

A. Yes, they seem to be the rates on grain prior to that date.

Q. 7. What is the effect of that increase on your business?

A. It means in dollars and cents at least \$2,000.00 a year to our business.

Q. 8. It puts that much handicap on your business?

A. Yes.

Q. 9. Have you any tariff sheets from the L. & N. relative to the rates from Louisville to Greenbrier?

A. I have a number of letters which I received from them from time to time naming these special rates back as far as January 18, 1894, and the last one dated October 25, 1902. All of these letters up to January 1, 1899, made special rate on grain of 8 cents per 100 pounds.

169 Q. 10. What was the regular rate in effect at that time?

A. I think it was 10 cents.

Q. 11. Rates were then higher generally on ordinary shipments than now?

A. Yes. The letter of February 8, 1899, made a rate of 5 cents per 100 pounds on all shipments of grain, in carloads, from Louisville to Greenbrier, from January 1, 1899. In that letter they said "This rate will be protected by voucher, and if you have any claims to present please have them made upon above basis and presented in the usual way." And it names a rate on whiskey from Greenbrier to Louisville, in car lots, of 25 cents per barrel.

Q. 12. Is there anything else you would like to state about this matter?

A. I would like to state in a general way that in establishing the distillery there we considered the question of freight rates on grain, and on all material as compared with Louisville, and after considering all those matters we determined to locate at Greenbrier. The rate has been reduced since we located there. In 1890 and 1891 the rate was 8 cents per 100, and then in 1899 it was reduced, after we had a conference with the L. & N. people, and since that time we have spent a good deal of money in erecting improvements to our distillery, and I am quite sure had we known at the time that there would be a tax of \$2,000.00 a year on it that we would not have made the improvements.

170 Q. 13. Do you regard the new rate of March 25th unjust and extortionate?

A. I considered that the rate of 5 cents was fair and equitable,

and I think to double that rate is unjust and unreasonable to the distilleries and places us to a disadvantage.

Q. 14. What size place is Greenbrier?

A. Practically nothing there except our plant.

Q. 15. No other shipments of grain to that place except yours?

A. No.

Q. 16. Your shipments come out of Louisville?

A. All.

Q. 17. Have you any objection to filing these letters as a part of your testimony?

A. No, sir.

Cross-examination by Mr. DEARING:

Q. 18. You consider the rate unreasonable because it formerly was 5 cents and because it has now been advanced to 10 cents?

A. If the rate was remunerative at 5 cents, doubling that rate is certainly unreasonable.

Q. 19. Assuming that it was not remunerative from a transportation point of view—assuming that it is not remunerative in the way of compensation, and that it is advanced to 10 cents, which would be reasonable, would that, in your opinion, be a reasonable rate?

A. I would be satisfied to pay a reasonable rate, but I 171 think if the L. & N. made a 5-cent rate it did not do it for its health.

Q. 20. You don't know that the cost of machinery has increased, and that everything used in the making of a railroad, and materials used in operating same has greatly increased. Don't you think a railroad has the same right to increase its rates as other things in proportion are increased?

Mr. McCHORD: Is that why you have increased these rates? Has the material that enters into the cost of transportation doubled?

A. It has.

Mr. DEARING:

Q. 21. You have got your refund, and you still want the same thing to happen.

A. We have been there a number of years and have spent a good deal of money at that place, made contracts on this freight rate, and I feel we are rather knocked out under this advance.

Mr. GOODWYN:

Q. 22. Did I understand you correctly, that you began there in 1891?

A. 1890.

Q. 23. Did you buy the distillery, or build?

A. Built.

Q. 24. The rate when you erected the distillery was 8 cents.

A. Yes.

Q. 25. You continued to pay 8 cents until in 1900?

A. Yes.

172 Q. 26. During those nine years to what extent did you improve your original investment, if at all?

A. We improved it very little compared with what we have done since 1899.

Q. 27. You, along with others interested in distilling, came to Louisville and interviewed our Vice-President and he reduced the rate to 5 cents for your benefit from 8 cents?

A. Yes. Our business has not sustained any loss during that time, and I suppose the L. & N. knew what it was doing too.

Q. 28. You assumed that the L. & N. knew its business when it made the 5-cent rate—and I think you are about right about that. Are you aware of the conditions under which it made that rate? Maybe I had better not put it that way. I think you heard my statement, and I believe you think I stated it correctly. A rate made under a given set of conditions is absolutely reasonable under those conditions, but suppose those conditions change—it is not impossible for conditions to change—would it be unreasonable for us to change the rate under the changed conditions?

A. I think that answers itself.

Q. 29. Then, if the conditions have changed, is not the L. & N. entitled to change its rates under new conditions?

A. You stated yourself that you were willing for the rate to stay at 5 cents.

Mr. GOODWYN: If the conditions are made, yes.

Mr. McCHORD: What are the conditions?

173 Mr. FINN: All of that is a question of argument.

Mr. GOODWYN: I am just trying to get the same witnesses who testified that the 5-cent rate is proper, to testify or admit that when the conditions change a rate may be too low.

Mr. FINN: Everybody knows that conditions can change.

Mr. GOODWYN:

Q. 30. The amount which you have received from the L. & N. in the way of a refund—you have a general idea of what it was, and you have a general idea of what you have paid on your whiskey produced, is not the amount of refund you received on grain about equal to what you paid for your whiskey from Greenbrier to this place?

A. You mean the amount of freight into Louisville?

Q. Yes.

A. No, sir, I would say not more than one-half. We make about 6,000 barrels a year, and the freight in car lots is 25 cents a barrel, which would be \$1,500.00. We do not pay this freight. I would like to say in this connection that in your statement you mentioned that California whiskey was quite often shipped via some other line. I want to say we are large shippers in products to that State, and I think I could show you a large number of letters urging our customers to ship by the L. & N.

Mr. GOODWYN: I think you will remember when I said what I

did, that I said I was very glad to say that a great many did not, but that a number did.

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THOS. S. MOORE.

Direct examination by Mr. McCHORD:

Q. 1. Where is your distillery located, Mr. Moore?

A. Near Bardstown.

Q. 2. How long have you operated there?

A. About 20 years.

Q. 3. Have you another distillery?

A. One in Daviess County.

Q. 4. Whereabouts in Daviess County?

A. Stanley.

Q. 5. How far from Louisville?

A. 120 miles.

Q. 6. What is your freight rate there on grain?

A. I am not very familiar with the rates, but I think 6 cents a 100.

Q. 7. You have seen this statement of rates here, the old and the new rates?

A. Yes, sir.

Q. 8. How long had the rate, prior to March 25, 1910, been in effect from Louisville to Bardstown?

A. 10 or 12 years.

Q. 9. Have you added to your plant much since that time?

A. Yes.

Q. 10. What is the volume of your business now?

A. We are making about 3,500 barrels. Up to a few years ago we made from 3 to 4,000.

Q. 11. You get all your grain from Louisville?

175 A. This year we got 85 to 90% from Bardstown. This is an exceptional year.

Q. 12. Is there any other transportation of corn from Bardstown except to distilleries?

A. No.

Q. 13. Then the volume of business is done by the distilleries?

A. Yes.

Q. 14. What effect will this increase have on your business?

A. It will be a net loss of something like 20 to 22 cents a barrel.

Q. 15. You regard it as unreasonable?

A. Yes, I think we have enough burdens to bear without having this additional raise.

Q. 16. The rates as before 1899, did you have anything to do with getting them reduced?

A. I had something to do with that. We were appointed by the distilleries to take the matter up and we met Mr. Stuart Knott in his office on Main Street here, and we talked with him and tried to make him believe that we were almost out of business, and we placed before him the fact that the Southern was only charging 5 cents.

when we were paying the L. & N. 8 cents, and we got the rate reduced from 8 cents to 5 cents.

Q. 17. When was that?

A. I think in 1899. The records will show.

176 Cross-examination by Mr. DEARING:

Q. 18. Don't you know the Southern, when it entered Lawrenceburg or Harrodsburg, especially when it knew that freight could be hauled from Frankfort, that it could put in a lower rate than was reasonable in order to get the rate?

A. I think so.

Mr. GOODWYN: Mr. Moore you and Mr. Marion Taylor and others interested had a conference with Mr. Knott about the freight rate in 1899, I believe, do you remember the arguments made?

A. Well, yes, there — several arguments made in connection with the rates.

Q. 19. The rate was reduced on both grain and whiskey?

A. Yes.

Q. 20. I believe your refund practically amounts to the freight on whiskey?

A. The refund is equivalent.

Mr. McCCHORD:

Q. 21. Does the purchaser of the whiskey get the rate?

A. He does.

Mr. GOODWYN:

Q. 22. Does the rate on whiskey not mean anything to you?

A. Certainly it does.

Q. 23. I thought you distillers had always told me the man 177 who purchased the whiskey had to pay the freight?

A. It is an advantage to us, of course, that the freight rates be reasonable.

Mr. McCCHORD: Complainants will rest the case at this point.

Mr. GOODWYN: With your permission I would like to ask if you will permit me to introduce Mr. Behring, of the Southern Railway Company, as a witness.

Mr. SILER: Go ahead.

F. H. BEHRING.

Direct examination by Mr. GOODWYN.

Q. 1. Mr. Behring, you are Assistant General Freight Agent of the Southern Railway Company?

A. Yes, sir.

Q. 2. In charge of its interests in Kentucky?

A. Yes.

Q. 3. You are familiar with the distilleries on the Southern and out on a portion of your line?

A. Yes.

Q. 4. The Southern has what rate on grain to distilleries?

A. 5 cents 100 pounds.

Q. 5. Is that an open rate?

A. Yes.

Q. 6. Do you move any grain from here to Lawrenceburg except for distillery purposes?

A. Occasionally.

178 Q. 7. How far is Lawrenceburg from Tyrone?

A. 4 miles.

Q. 8. Are you in a position to testify positively whether grain has been moved by boat or not?

A. Yes.

Q. 9. In quantities to effect your freight rate—does it effect your rate at Lawrenceburg?

A. We carry the same as at Tyrone.

Q. 10. There is a river movement at Tyrone?

A. Yes.

Q. 11. Is that in any quantities?

A. When the boats operated it amounted to full boat loads.

Q. 12. I wanted to show the situation at Tyrone was affected by the river. You have relief from the Kentucky Railroad Commission between here and Tyrone. They have granted you the long and short haul provision?

A. Yes.

Q. 13. You apply that?

A. Except at Alton, we have the same rate as at Tyrone.

Q. 14. The relief the Commission gave does not compel you to make any reduction at any of these immediate points?

A. Does not.

Q. 15. You have made your 5-cent rate open for all the distilleries along these points?

A. We construed the law to mean not to carry two separate rates.

179 Q. 16. You are following the instructions of the Interstate Commerce Commission?

A. Yes.

Mr. McCHORD:

Q. 17. You think that is fair, just and reasonable to all these people?

A. We think we ought to be compelled to, from the ruling of the Interstate Commerce Commission.

Q. 18. When did you put these rates in?

A. I could not say.

Q. 19. They were in when you came in?

A. Yes.

Q. 20. You don't know the reason that actuated that.

A. We put them in on account of river competition.

Q. 21. How long have the boats been operating there?

A. I don't know.

Q. 22. How long have those boats been carrying freight, or running up and down that river?

A. Been operating as long as I have been in Louisville, over 10 years.

Q. 23. Then the river shipping point from Harrodsburg is 22 miles, is it not?

A. Yes.

Q. 24. When distillery supplies are brought up the river they are landed within 22 miles of Harrodsburg, at Tyrone?

A. That is the landing point for Tyrone.

Q. 25. What is it for Harrodsburg?

180 A. I don't know whether they drive toward Camp Nelson or not.

Q. 26. How far from Camp Nelson?

A. I don't know. We have no competition at Harrodsburg.

Q. 27. Why do you put in the same rate?

A. We put the same rate in for all distilleries, for the development of our interests.

Q. 28. Do you think that is fair to do that for the development of your interests?

A. We would not have done it unless we were protecting the interests of other people.

Q. 29. But it does not apply to Harrodsburg?

A. No.

Q. 30. And those rates you believe are just, reasonable and fair?

A. Just as far as we know.

Mr. GOODWIN: I understood him to say that while he was not with the company when those rates were made, they were made because of the competition, and that they made the Lawrenceburg rate the same as the Tyrone rate, and that they made the Harrodsburg rate, for the same reason.

A. Yes.

Q. 32. Do you feel that it would be good policy to meet a situation at Tyrone where whiskey could be moved out by the river, and refuse to develop an industry 6 miles from there?

A. No.

181 Mr. McCHORD:

Q. 33. How far from Tyrone to Lawrenceburg?

A. 4 miles.

Mr. FINN:

Q. 34. What is the distance from Louisville to Lawrenceburg?

A. 66 miles.

Q. 35. What station between Louisville and Lawrenceburg where there is no distillery industry where you ship grain to?

A. Shelbyville.

Q. 36. What is the rate on grain over the Southern from Louisville to Shelbyville?

A. I don't recall just now. I gave the rate there to Mr. Goodwin. It is 8 cents.

Mr. DEARING:

Q. 37. What is the distance to that place?

A. 31 miles by the L. & N. and 40 miles by Southern.

Mr. DEARING: Now you have heard the statement, will you consider that and the cross-examination?

Mr. SILER: Yes.

Mr. GOODWYN: I want to make this statement. In the visit Mr. Moore, Marion Taylor, and others, made to Mr. Knott in 1899, for the purpose of getting a reduction on rates, they procured a reduction on grain to distilleries at Lawrenceburg. Now you have heard testified that the rate to Tyrone was made because of the boat competition. We made the same rate to the Bardstown branch station as to Tyrone, L. & N. put the Bardstown branch on 182 the same rates and we are asked to keep them there indefinitely.

Mr. McCHORD: Mr. Goodwyn, have you your local tariffs with you?

—. No, I have our local rates to Louisville on grain and local rates on whiskey, but I can give you any information you desire.

Mr. DEARING: Mr. Goodwin, is there anything you desire to state in addition to what has been stated this morning?

Mr. GOODWYN: No. Well, I do want to add one or two features. The testimony here has been confined almost entirely to the Bardstown branch distilleries, and that represents a comparatively small part of the distilling interests in Kentucky. We have some large distilleries on the Knoxville branch, and out in Central Kentucky. We can not handle this question as relating exclusively to the Bardstown branch, and while these gentlemen have developed what the situation is from the Bardstown branch, now we will have to look at this matter as a whole. The point I want to say is that there are other places that must be considered. In fact I think some of our agents are interested, or at some of these points, say Chapeze, St. Marys and Greenbrier the superintendent is our agent. There are distilleries in Richmond on our line, and on the Kentucky Central, and what is done for the Bardstown branch has got to be done for the Knoxville and Central Kentucky branches, and while

183 the amount of corn shipped between here and Clermont and Chapeze may not be large, that is not true between Louisville and other points further away where there are distilleries.

And still further, I want to ask you gentlemen in considering this matter to remember that the L. & N. as a public service corporation can not consider one interest alone for one place. We can not undertake to do something for Louisville and refuse to do that same thing for other points where the circumstances are precisely the same. If you force us to make this reduction we will have to make it in Cincinnati. We can not deny our patrons at Cincinnati equal rights, and we would in all common fairness have to give the same reduction to Cincinnati, Evansville, and every point on our line in Kentucky south of Cincinnati and west of Livingston and as far as Lebanon Junction on the Knoxville branch of our road. If this was a question of applying rates from Louisville on grain

to small concerns that got no grain except for distilling purposes, if that was all that was involved, I think you will concede that this question would not have come up. They have been doing business on the L. & N. some of them for 25 years, and since I have been general freight agent I have not had a dozen complaints from distilleries in that time. This proposed action of ours would not have been taken unless we felt that we had to in self protection. We want to look to the welfare of the distilleries along our line, but we believe our paramount duty is to ourselves first, and we can not do what we are asked to do without a sacrifice as to the results, and we believe we are warranted in making this change in rates.

184 Mr. MCCORD: The distilleries along on your road, as you say you have many, they were in operation at the time you put the 5-cent rate in force?

Mr. GOODWYN: I presume they were.

Mr. DEARING: Now gentlemen, I want to say that I don't want to keep you out of a judgment against us by our delay, but I don't think we ought to be compelled to work in the hot weather. Every other Commission takes a rest. The Interstate Commerce Commission is taking a rest now, and I can't see why there should be any rush about this matter, these gentlemen will not be damaged any by the delay—this is not the season that they are operating, and I think we ought not to be rushed about this matter.

Mr. SILER: We have made up our minds to give you a vacation.

Mr. DEARING: The distilling season does not come until in October.

Mr. MCCORD: They are looking out for contracts in advance.

Mr. SILER: When do you want to argue the case?

Mr. DEARING: I don't think this Commission has a right to make a decision in regard to the reparation. In the veneer Lumber Company case it was decided that the Commission had no right to award reparation.

Mr. SILER: This is an important case on that point.

Mr. DEARING: For that reason I want to argue the case. The Interstate Commerce Commission did not have the power until after the Hepburn Act came in force.

185 Mr. MCCORD: This Commission has always had that power.

Mr. SILER: The Commission comes to this conclusion. As soon as the record is completed copies will be furnished the complainants and defendants, and from the date the copies are furnished the complainants and defendants they will have ten days in which to prepare their case for argument, and the argument will be heard ten days from date you will receive copy of the record.

At this point the meeting adjourned.

186 Before the Railroad Commission of Kentucky.

GREENBRIER DISTILLERY COMPANY et al., Complainants,  
vs.  
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

*Affidavit.*

The affiant, Minnie Murphy, states that she now resides at Williamsburg, Kentucky; that for a period of four years, i. e., from the 15th day of December, 1907, to the 15th day of December, 1911, she was employed as, and served in the capacity of, stenographer or reporter for the Kentucky Railroad Commission. Affiant further states that she was present as such stenographer at a meeting of the Kentucky Railroad Commission held on the 24th day of June, 1910, at Louisville, Kentucky, at which the above-styled cause, then pending before said Commission, was heard, and that at said meeting she made shorthand notes covering all of the testimony adduced by the parties and other proceedings had by or before the Commission at said hearing; that thereafter she made and filed in the office of the Railroad Commission, as required by law, a copy of the testimony and other proceedings had at said hearing. Affiant further states that the foregoing 71 pages constitute a full, true, correct and complete transcript of all the testimony offered, introduced

187 or heard by the complainant and the defendant, and other proceedings before said Commission on the hearing of the above-styled complaint.

MINNIE MURPHY.

Subscribed and sworn to before me by Minnie Murphy, this December 16, 1913. My commission expires on the 25th day of March, 1914.

[SEAL.]

CHAS. H. MARTIN,  
*Notary Public, Whitley County, Kentucky.*

On the 8th day of January, A. D., 1914, upon the filing of the foregoing amended and supplemental bill of complaint, the court in pursuance of the prayer therein, granted the following temporary restraining order, viz:

188 United States District Court for the Eastern District of Kentucky.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kober, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, Defendants.

*Restraining Order on Amended and Supplemental Bill.*

The complainant, Louisville & Nashville Railroad Company, moved the court to grant to it an interlocutory injunction in accordance with the prayer of the amended and supplemental bill this day tendered and with leave of court permitted to be filed in the above-styled suit, and said motion and application are now

189 fixed for hearing on the 16th day of January, 1914, at 2 o'clock, p. m., in the court room of the above-styled court, in the city of Covington, Kentucky, and it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said motion and application for an interlocutory injunction unless the defendants are, pending said hearing, temporarily restrained as therein set forth, it is now ordered that a temporary restraining order be and the same is hereby granted, enjoining and restraining the defendants, Laurence B. Finn, Green Garrett and William Klair, and each of them individually and as constituting the Railroad Commission of Kentucky, from in any manner continuing said Commission's rate-making order and reparation order made August 10, 1910, and promulgated August 31, 1910, mentioned and referred to in complainant's original bill as amended and in its amended and supplemental bill this day filed, and from recommending or causing to be instituted any prosecution by indictment or otherwise or civil action against the complainant or any of its officers, agents or employes to recover any fine or penalty imposed by what is known as the McChord Act of the Kentucky Legislature, enacted March 10, 1900, for or on account of the complainant's failure or refusal to put into force or effect on its lines of railroad in the State of Kentucky, under protest or otherwise, said Commission's said rate-order made August 10, 1910, and promulgated August 31, 1910, in the proceeding before said Commission of the defendant, Greenbrier Distillery Co. and others

against the complainant, Louisville & Nashville Railroad Company, or the rates fixed thereby or set forth in the schedule prepared then or thereafter, and also enjoining and restraining the defendant, Laurence B. Finn, as Chairman of said Commission, from filing a certified copy of the said order awarding certain sums for so-called reparation to the defendant, Greenbrier Distillery Company and the other corporate defendants named in complainant's said amended and supplemental bill, made August 10, 1910, and promulgated August 31, 1910, or from filing a certified copy of the evidence heard at the hearing or trial of the complaint of said defendant, Greenbrier Distillery Company and others against the complainant, Louisville & Nashville Railroad Company, in the office of the clerk of the circuit court of any county in the State of Kentucky having jurisdiction of the amount of said awards or either of them, or the office of the clerk of the circuit court of any county into or through which the lines of railroad owned or operated by complainant extend and over which the freight commodities, concerning the rates on which said awards were made, were or are transported, and that this temporary restraining order against said defendants, individually and as constituting the Railroad Commission of Kentucky and against the defendant, Finn, as Chairman hereof, shall be and remain in force until a hearing and decision upon said motion or application for an interlocutory injunction and the further order of the court in the premises.

This 8th day of January, 1914.

A. M. J. COCHRAN,  
*U. S. District Judge.*

THE UNITED STATES OF AMERICA,  
*Eastern District of Kentucky, ss:*

I, J. W. Menzies, Clerk of the United States District Court, for the Eastern District of Kentucky, at Frankfort, do hereby certify that the foregoing is a true and correct copy of restraining order on amended and supplemental bill made and entered January 8, 1914, herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Frankfort, Ky., this 8th day of January, A. D. 1914, and of the Independence of the United States of America the 137th year.

J. W. MENZIES, *Clerk,*  
By M. S. BARRETT, *D. C.*

[SEAL.] Received this restraining order at Frankfort, Ky., on January 9, 1914, and executed same by delivering a true copy hereof to each of the following named defendants, viz: Laurence B. Finn, Green Garrett and William Klair, at Frankfort, Ky., on January 13, 1914.

A. B. PATRICK,  
*U. S. Marshal,*  
By N. I. McDANIEL, *E. M.*

The foregoing Restraining Order was returned and filed on January 13, 1914, endorsed as follows, viz:

On a day following to wit: On January 17, 1914, the Opinion of the Supreme Court on former appeal herein was filed, same being omitted herefrom.

See 231 U. S. 298-320.

On the same day, to wit: On January 17, 1914, the Mandate of the Supreme Court on former appeal herein was filed in the Clerk's Office of this Court, same being in words and figures as follows, viz:

192

*Mandate.*

# 686.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Eastern District of Kentucky, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the Eastern District of Kentucky, in a cause between Louisville & Nashville Railroad Company, complainant, and Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually, and as constituting the Railroad Commission of Kentucky, defendants, wherein the order of the said Circuit Court, entered in said cause on the 12th day of January, A. D. 1911, is in the following words, viz:

"This cause having come on to be heard upon the motion of complainant for interlocutory injunction and having been considered, and the opinion of the court thereon having been filed on January 9, 1911, and leave for further amendment having been given, and a second amended bill, paragraph XXI having been this 12th day of January, 1911, filed pursuant to such leave, and such second amended bill having been also considered,

It is ordered that such motion be and is hereby denied.

And it being represented in open court that complainant desires to appeal from the foregoing order, and it appearing that irreparable injury to complainant would result from the denial of such injunction if, upon appeal, such injunction should be granted.

It is further ordered that the existing restraining order of date September 7, 1910, is continued for the period of thirty days from this date; provided that complainant perform the following four conditions:

1. Take and perfect its appeal from this order denying the interlocutory injunction.

2. File with the clerk a complete statement of all freight charges received by it before January 1, 1911, and since August 10, 1910, in excess of the rates fixed by the commission order of that date, and pay into court the total amount of such excess charges. Such statement shall show the names and addresses of all parties paying such excess. Such money paid into court, and subsequent similar

payments, shall be refunded to the parties paying the excess, respectively, if it shall finally be determined that such excess was not lawfully collected—otherwise to be returned to the complainant.

193 3. Thereafter, and on the 15th of each month, commencing February 15, file a similar statement and make a similar payment covering the preceding calendar month,—such monthly statements and payments to be continued until the further — of this court or the Supreme Court.

4. File with the clerk a bond to the United States for the use of such parties as this court may direct, in the penalty of \$10,000, with surety approved by the clerk, conditioned for the performance of all the provisions of the preceding paragraph No. 3.

And it is further ordered that such restraining order be and is hereby then further continued until the disposition of the appeal by the Supreme Court and by mandate or until the Supreme Court otherwise order,—unless defendants should make it appear to this Court that condition 1, 2 or 4 has not been performed within such thirty days."

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, at the October Term, A. D. 1911, of said Supreme Court, the resignation of Adam T. Siler and Lew P. Tarlton and the appointment of Green Garrett and William F. Klair, as their successors as members of the Railroad Commission of Kentucky, having been suggested, it was ordered that the said Green Garrett and William F. Klair, as members of the Railroad Commission of Kentucky, be made parties appellees in this cause.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Circuit Court in this cause be, and the same is hereby affirmed with costs; and that the said Green Garrett, Lawrence B. Finn, and William F. Klair, individually and as constituting the Railroad Commission of Kentucky, recover against the said complainant for their costs

194 herein expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Kentucky.

DECEMBER 1, 1913.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the sixth day of January in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,  
*Clerk of the Supreme Court of the United States.*

Costs of Garrett et al.:

Clerk.....  
Printing Record.....  
Attorney.....  
Paid by complainant.

Endorsed: File No. 22,526. Supreme Court of the United States No. 23. October Term, 1913. Louisville & Nashville Railroad Company vs. Green Garrett et al., etc. Mandate. Filed Jan'y 17, 1914. J. W. Menzies, U. S. Clerk.

195 On the same day, to-wit, on January 17, 1914, the following order was made and entered herein, viz:

SATURDAY, January 17", A. D. 1914.

United States District Court, Eastern District of Kentucky  
at Frankfort.

Court met.

Present: Hon. John W. Warrington, Circuit Judge; Hon. Arthur C. Denison, Circuit Judge; Hon. Edward T. Sanford, District Judge.

No. 686. Equity.

LOUISVILLE & NASHVILLE R. R. Co., Complainant,  
vs.

LAURENCE B. FINN et al., Defendants.

This day came the complainant and presented its amendment to paragraph IV of its amended and supplemental bill filed herein January 8, 1914, which amendment was allowed to be filed.

Complainant also filed the affidavits of R. Tobin, R. L. McKellar, and the exhibit made part thereof, and Brent Arnold and the map referred to and made part thereof.

The defendants filed the affidavit of defendant Laurence B. Finn.

Thereupon the appearance of the corporate defendants made parties defendant herein by complainant's said amended and supplemental bill was entered by their attorneys, Edward W. Hines and J. Van Norman, and the defendants then moved the court to enter an order distributing the fund in court among the parties

196 who paid the same to complainant in excess of the rates prescribed by the Kentucky Railroad Commission in its order of August 10, 1910, to which motion the complainant objected. The complainant's notice of its application for an interlocutory in-

junction accepted by the Governor and Attorney General of the State of Kentucky was filed by complainant.

The application for an interlocutory injunction having been made before the district judge and he having declined to sit thereon, referred the same to Circuit Judge Warrington. Thereupon Circuit Judge Warrington designated Circuit Judge Denison to hold the District Court in this matter, and he called Circuit Judge Warrington and District Judge Sanford to sit with him to hear and determine said application.

And said application coming on to be heard upon the pleadings, exhibits and affidavits filed herein, was argued by counsel for complainant and defendants and said application was submitted, with leave to each party to file briefs, within one week from this date.

Filed Jan. 17, 1914, J. W. Menzies, U. S. Clerk.

197 Said Amended Bill filed January 17, 1914, (amending Par. 4 of Amended and Supplemental Bill filed on Jan. 8, 1914,) is in words and figures as follows, viz:

United States District Court for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD CO., Complainant,  
vs.

LAURENCE B. FINN et al., Defendants.

*Amended Bill.*

The Complainant amends paragraph IV of its amended and supplemental bill filed herein January 8, 1914, by adding thereto the following clause, to wit:

Sec. 829, Kentucky Statutes is unconstitutional and void because the provisions thereof violate Sec. 59, Sub-section 1 of the State Constitution of Kentucky, which prohibits special acts concerning the practice of courts of justice or the rights, powers or duties of the officers thereof.

WILLIAM A. COLSTON,  
ED. S. JOUETT,  
HENRY L. STONE,  
*Solicitors for Complainant.*

Filed Jan. 17, 1914. J. W. Menzies, U. S. Clerk.

198 Said affidavit of Richd. Tobin, filed on January 17, 1914, is as follows, viz:

No. 686.

GREENBRIER DISTILLERY COMPANY et al.  
vs.  
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The affiant, Richard Tobin, states that he is the Secretary of the Kentucky Railroad Commission, and as such has custody of the records of the said Railroad Commission, and affiant further states that there is not on file in the office of the Commission any record or transcript of the testimony taken in the above styled case at the meeting of the Commission held in the city of Louisville on June 24th, 1910, and that said record or transcript of testimony has either been lost or mislaid, and that a diligent search of the files has failed to find it.

RICH'D TOBIN.

Subscribed and sworn to before me this January 16th, 1914.

[SEAL.]

CATHERINE B. McNAMARA,

*Notary Public of Franklin County.*

My commission expires February 8, 1914.

Filed Jan. 17, 1914. J. W. Menzies, U. S. Clerk.

199 Said affidavit of R. L. McKellar and Exhibit "A" filed therewith are as follows, viz:

United States District Court, Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN et al., Defendants.

*Affidavit.*

The affiant, R. L. McKellar, says that he is Assistant Freight Traffic Manager of the Southern Railway Company, at Louisville, Kentucky, and that the letter hereto attached, marked "Exhibit A" is a true and correct copy of the letter in which he quoted certain rates to Mr. C. C. McChord at his request, these rates in cents per hundred pounds being the tariff rates in effect at that time.

R. L. MCKELLAR.

Subscribed and sworn to before me by R. L. McKellar this 16th day of January, 1914. My commission expires January 30, 1916.

GEO. R. EWALD,  
*N. P. Jeff. Co., Ky.*

## EXHIBIT A.

A.

May 19th, 1910.

Mr. C. C. McChord, c/o Paul Jones Building, Louisville, Ky.

DEAR SIR: Rates from Louisville to Kentucky Distilling Points.

200 Referring to conversation today:

Our rates from Louisville to Lawrenceburg and Harrodsburg on commodities used by the Distilleries at those points, are as follows:

	Lawrenceburg.	Harrodsburg.
Grain .....	5	5
Barrels, empty C.L. Min. 10,000 # .....	15	16
Barrels, empty L.C.L. ....	20	20
Boxes, empty, wooden, C.L. 15,000 # .....	15	17
Boxes, empty, wooden, L.C.L. ....	28	34
Bottles, common glass, packed C.L. ....	18	18
Bottles, common glass, packed L.C.L. ....	22	26
Hoop iron, any quantity.....	10	10

Yours truly,

R. L. MCKELLAR,  
*Ass't Freight Traffic Manager.*

sn

Filed Jan. 17, 1914. J. W. Menzies, U. S. Clerk.

201 Said affidavit of Brent Arnold and the exhibit "Map" filed therewith on January 17, 1914, are as follows, viz:

Filed Jan. 17, 1914. J. W. Menzies, U. S. Clerk.

United States District Court, Eastern District of Kentucky.

No. 686.

LOUISVILLE &amp; NASHVILLE RAILROAD COMPANY, Complainant,

vs.

LAURENCE B. FINN et al., Defendants.

Affiant, Brent Arnold, says that he is the Superintendent and General Freight Agent of the Louisville & Nashville Railroad Company, with headquarters at Cincinnati and has held that position for a number of years; that he is familiar with the lines of railroad owned and operated by the Louisville & Nashville Railroad Company in the State of Kentucky together with the location of the stations thereon and the distances between same. He says that the map which is attached hereto and filed herewith as part of this affidavit marked "Exhibit Map" is a true and correct representation of the railroad lines of the said Louisville & Nashville Railroad Com-

pany in central Kentucky, covering a strip extending from the Ohio River nearly to the Tennessee line and of a width of about — miles, extending from Elizabethtown on the west of Winchester on the east.

He says that on said map there are represented and named all the stations which are of enough importance *of* have a station agent in charge thereof; the other stations are represented by small white circles with no name given.

Affiant says that those stations which were covered specifically by the language of the order of the Kentucky Railroad Commission in this proceeding are indicated on this map, some by purple ink and some by red ink; that of these the ones shown in red ink are the only ones about which any evidence was offered in the hearing before the Kentucky Railroad Commission, there being no evidence offered with reference to those indicated in purple ink.

202 Affiant says that the other stations indicated on said map, being those shown in black ink were not especially involved in this proceeding, but will be indirectly affected, and many of them very materially affected as to rates if the order of the Commission involved herein is permitted to stand. Affiant says that some of the distances as shown upon said map, which may be relevant, are as follows:

Louisville to Lebanon, 67 miles; Lebanon to Silver Creek, 62 miles, Covington to Silver Creek, 127 miles, Louisville to Eminence, 40 miles.

BRENT ARNOLD.

Subscribed and sworn to before me by Brent Arnold this 17th day of January, 1914.

[SEAL.]

M. VAN BELL,  
*U. S. Com'r.*

(Here follows map marked page 203.)

204 Said affidavit of Laurence B. Finn referred to and filed by foregoing order on January 17, 1914, is as follows, viz:

In the United States District Court for the Eastern District of Kentucky.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kober, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillerly, Defendants.

*Affidavit of Laurence B. Finn.*

Filed by Defendants.

The affiant Laurence B. Finn states that he is a member of the Kentucky Railroad Commission and also Chairman of said Commission, and that he was a member of said Commission when the orders complained of herein were made and has been continuously a member of said Commission since that time.

The affiant further states that he was not when the last amended and supplemental bill of complaint was filed herein about to file, and has never intended to file, a certified copy of the reparation order of said Commission of August 10, 1910 in each of the counties of Kentucky which would have jurisdiction of the controversy as to the matters determined by or embraced in said order. Affiant further states that by far the greater part of the rates in controversy were rates on shipments originating at Louisville, Kentucky, and 205 that the Jefferson Circuit Court would have jurisdiction of the controversy as to said rates, and affiant states that he has never at any time intended to file said order of reparation or the record upon which said order was made in any other Court than the Jefferson Circuit Court until the validity of said order of reparation should be first determined by said Court or by the Court of Appeals of Kentucky. The affiant further states that the question as to the validity of the section 829 of the Kentucky Statutes is now before the Court of Appeals of Kentucky in a case pending in that Court and has been argued and submitted in that Court, and that it is not his purpose to file said order of reparation or said record in any Court until said cause in which said question is presented to the Court of Appeals has been determined by that Court.

LAURENCE B. FINN.

Subscribed and sworn to before me by Laurence B. Finn this 14th day of January, 1914. My commission expires Feb'y 23, 1916.

C. F. SAUNDERS,  
*Notary Public, Franklin Co., Ky.*

Filed Jan. 17, 1914, J. W. Menzies, U. S. Clerk.

206 Said motion of defendants to distribute fund in court, filed by foregoing order on January 17, 1914, is as follows, viz:

United States District Court, Eastern District of Kentucky, at Frankfort.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kobert, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co, Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillerly, Defendants.

*Motion to Direct Distribution of Fund in Court*

The defendants having filed the mandate of the Supreme Court of the United States affirming the judgment of this Court of January 12, 1911 denying an interlocutory injunction herein now move the Court to require the Clerk of this Court to distribute to the persons showing themselves to be entitled thereto the fund paid into Court under said judgment and to pay to each of the various persons, firms or companies who paid to complainant the sums paid into Court the amount paid by said person, firm or company.

JAMES GARNETT,  
*Attorney General.*  
HINES & NORMAN,  
*For Defendants.*

Filed Jan'y 17, 1914. J. W. Menzies, U. S. Clerk.

207 Said Notice of Motion for Interlocutory Injunction, accepted by Governor and Attorney General and filed and referred to in foregoing order of January 17, 1914, is as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN et al., Defendants.

To Honorable James B. McCreary, Governor, and Honorable James Garnett, Attorney General, of the Commonwealth of Kentucky.

DEAR SIRS: You will please take notice that in the above styled suit the complainant will on Friday, January 16, 1914, at the hour of 2 o'clock, p. m., in the court room of the United States District Court for the Eastern District of Kentucky, at Covington, apply to said court for an interlocutory injunction, enjoining and restraining the enforcement of the order fixing certain rates and the order awarding certain sums for reparation made and entered by the Railroad Commission of Kentucky August 10, 1910, and promulgated August 31, 1910, in the proceedings then pending before said Commission, wherein the Greenbrier Distillery Company and others were complainants and the Louisville & Nashville Railroad Company was defendant, upon the grounds set forth in complainant's amended and supplemental bill filed in the above styled suit on January 8, 1914.

This notice is given in pursuance of the provisions of Section 266 of the Judicial Code of the United States in force January 1, 1912, and the amendments thereto.

This January 9, 1914.

WILLIAM A. COLSTON,  
ED. S. JOUETT,  
HENRY L. STONE,  
*Solicitors for Complainant.*

We accept service of the foregoing notice, This Jany. 10, 1911,

JAMES B. McCREARY, *Governor.*  
JAMES GARNETT,  
*Att'y Gen'l of the Commonwealth of Kentucky.*

Filed Jan'y 17, 1914. J. W. Menzies, U. S. Clerk.

208 Said Designation of Honorable Arthur C. Denison, Circuit Judge, to hear and dispose of this case, referred to and filed by the foregoing order of date January 17, 1914, is as follows, viz:

*Designation.*

UNITED STATES OF AMERICA,  
*Sixth Judicial Circuit, ss:*

No. 686.

To the Hon. Arthur C. Denison, Circuit Judge of the Sixth Judicial Circuit of the United States:

Whereas, application for an interlocutory injunction having been made before the District Judge of the Eastern District of Kentucky in the case of Louisville & Nashville Railroad Company v. Laurence B. Finn, et al., #686, and the District Judge having declined to sit therein and referred the same to the undersigned, and,

Whereas, in my judgment the public interest so requires, you are, pursuant to Section 18 of the Judicial Code, hereby designated and appointed to hold the District Court in the matter of the hearing and disposition of said cause, in the city of Covington, State of Kentucky, and to exercise within the District the same powers that are vested in the Judge thereof, to such extent as may be found necessary, for and during the time necessary to hear and finally dispose of the cause.

J. W. WARRINGTON,  
*Senior United States Circuit Judge,*  
*Sixth Judicial Circuit.*

January 17, 1914.

Filed Jan. 17, 1914, J. W. Menzies, U. S. Clerk.

209 On a day following, to wit: On May 14, 1914, the following order was made and entered herein, viz:

United States District Court for the Eastern District of Kentucky.

In Equity. No. 686.

LOUISVILLE & NASHVILLE RAILROAD CO., Plaintiff,  
 vs.

KENTUCKY RAILROAD COMMISSION et al., Defendants.

Present: Hon. Arthur C. Denison, Circuit Judge, Sitting as District Judge by designation.

In the above entitled cause, the motion of the plaintiff based upon its amended and supplemental bill and its further showing by affidavit for a preliminary injunction against the defendants having come on to be heard, and having been argued before and submitted to the court consisting of Hon. Arthur C. Denison, Circuit Judge, sit-

ting as District Judge by designation, and Hon. John W. Warrington, Circuit Judge and Hon. Edward T. Sanford, District Judge, such court having been constituted pursuant to §266 of the Judicial Code.—all as appears by previous orders duly entered herein; and such motion having been duly considered by such court and such court having filed in this cause its per curiam opinion from which it appears that both such motions should be denied and the restraining order now in force should be dissolved.

210 It is thereupon ordered:

1. That the motion of plaintiff for injunction against the defendant Railroad Commission be and the same is hereby in all respects denied.
2. That the motion of the defendants, claimants to the fund in court, for a distribution of such fund, be and the same is hereby denied.
3. That the restraining order now in force be and the same is hereby dissolved; such dissolution, however, to take effect upon the 30th day of May, 1914, and the restraining order in the mean time to continue in force.

Approved for entry May 14, 1914.

ARTHUR C. DENISON,

*Circuit Judge, Sitting by Designation as District Judge.*

Said Opinion of Court referred to and filed by the foregoing order is as follows, viz:

211 United States District Court for the Eastern District of Kentucky.

In Equity. No. 686.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,

vs.

KENTUCKY RAILROAD COMMISSION et al., Defendants.

Motion for Interlocutory Injunction. Heard before Warrington and Denison, Circuit Judges, and Sanford, District Judge, under § 266 of the Judicial Code.

*Per Curiam:*

The general situation appears by our former opinion (186 Fed. Pep., 176) and by the opinion of the Supreme Court (231 U. S., 298). On the former hearing, plaintiff urged, as one ground of relief, that the order of the Railroad Commission had been without any evidence whatever that its newly prescribed rate was reasonable, and, hence, that the order was invalid; and it supported this allegation by affidavits that upon the hearing before the Commission, no evidence to this effect was offered. We held that these affidavits stated only conclusions of law, so that the allegation of lack of evidence was itself not proved; and this view was also taken by the

212 Supreme Court. As to the desired injunction against the reparation order, it was held, both by this court and the Supreme Court, that the question could not be raised on a record to which the reparation claimants were not parties. The case having been remanded, plaintiff now files an amended bill and makes a new motion for interlocutory injunction. As to the future rate, the present motion is based upon the same proposition that the Commission had before it no evidence that the new rate was reasonable; and upon this motion, the allegation is supported by a transcript of all the proceedings before the Commission, and it is said that, by this transcript, the lack of any evidence to support the Commission's finding sufficiently appears. As to the reparation order, it now appears that the claimants under that order have been made parties.

Counsel for the Commission and the claimants first urge that the matters have been adjudicated, or that, at least, we ought not to hear, for the second time, the same motion in the same case. A decision either way upon a motion for interlocutory injunction is the exercise of discretion, and such exercise is not final (*Acme Co. v. Commercial Co.* — C. C. A. 6 — 192 Fed. Rep., 321.); it therefore must continue within the power of the court upon a later application to reach the other conclusion upon more convincing evidence, or, indeed (save for the effect of a mandate from a reviewing court), upon the same evidence. The opinion and mandate of the Supreme Court cannot be considered as controlling, since that court carefully refrained from deciding what the effect would have been if the allegation of lack of evidence had been proved or if the necessary parties had been present; and the mandate takes effect with

213 reference to the then existing record. On the other hand, the renewal of such a motion upon grounds or upon evidence

which should have been presented upon the first application is to be discouraged, and an application once refused, will not be, at a later stage, granted, save in a clear case (*Chancellor Vrooman, in Buckley v. Corse*, 1 N. J. Eq., 504, 510). The result of such a situation as this is that the court has power to hear the renewed application on its merits; that whether it should do so is a matter of discretion; and that it would sharply refuse to do so, if it appeared that the first application had been with any purpose of experimenting with the court or of getting indirect advantages. We see no reason to think that there was any such purpose here, or to doubt that the imperfect showing upon the first hearing was the result of a good faith mistake as to the kind of proof necessary to establish what counsel considered a really undisputed fact and as to who were necessary parties. The long delay which has operated to keep the restraining order in force resulted from the unexpected grouping of this case with other railroad cases in the Supreme Court, and can hardly be charged against plaintiff. Upon the whole, we think we ought to consider the merits of the motion.

It is next urged that, even if no evidence on the subject was put before the Commission, that fact does not justify this court in setting aside the order fixing a future rate; in other words, it is said that the cases in which the Supreme Court has, for this reason, va-

cated an order of the Interstate Commerce Commission do not apply where a federal court is dealing with the order of a state commission—and this for the reason that the Interstate Commerce Act expressly gives to the courts a power to review, while the Kentucky

Act contains no such general provision. It is an interesting  
214 question whether the power of this kind which the Supreme Court has exercised depends in any degree upon this clause of the Interstate Commerce Act (I. C. C. v. U. P. R. R., 222 U. S. 541, 547; I. C. C. v. L. & N. R. R., 227 U. S. 88, 92); or whether, since legislative power cannot be given to the courts, this exercise depends on the inherent right to forbid prejudicial action under color of an order invalid because made without jurisdiction (Proctor v. U. S., 225 U. S. 282, 298). However this may be, we think the question is not now controlling, and we pass it by without decision, assuming, but only for the purposes of this case, that if in truth there was no supporting evidence, the order cannot stand.

The meritorious question so developed should be approached in the light of these rules which we may take as now established: first, proof that a railroad company has for a considerable time voluntarily maintained a given rate, is evidence of the reasonableness of that rate and will support an order fixing that rate as a lawful one; and, second by way of modification or exception, if the rate so maintained was due, not to normal and ordinary causes, but was special and to meet some special situation (like water competition), its making and maintenance then cease to be any evidence that, in the absence of those special conditions, it would be reasonable (I. C. C. v. L. & N. R. R., 227 U. S. 88).

In the instant case, it is conceded that the new rates fixed by the Commission for all grain inward bound to all persons for all purposes, were the same as the rates which the railroad had voluntarily maintained for many years for grain shipped inward bound to distillers for distilling purposes. Under the first rule just stated, this

fact becomes, *prima facie*, an admission, and therefore evidence, that the rates were reasonable for grain. The railroad  
215 seeks to bring the case within the above stated second rule or exception, by showing that the rates upon all grain outbound and upon all grain inbound, to all persons except distillers, had always been much higher, and that the distillers' rate was an abnormal one induced and justified by two considerations; first, that a very low and (directly) nonremunerative rate for distillers was established for the sake of building up and encouraging an industry which otherwise could not have existed in the interior of the state at a distance from the Ohio River gateways where grain could be more cheaply obtained; second, that these grain shipments to distillers resulted in return outbound shipments of the finished product carrying a high rate and counterbalancing the unprofitable rate on the raw material. Based upon these premises, the railroad propounds a case of irreparable injury by reason of the reduction in its rates on all grain not for distillers and as to which the special conditions never have existed and do not exist. The claim that the newly ordered rate has never been voluntarily maintained, except

for distillers, is conceded to be true; the two recited special conditions—encouragement of a new industry and a high-class return traffic—seem to have rested, at the hearing before the Commission, partly upon assertions of counsel rather than upon proof; but perhaps they were not disputed, and we take them as true.

The claim that the low rates amount to nothing as present evidence of what is reasonable, because they were specially made to build up an otherwise impossible industry, is fully met by the railroad's concession, made upon the argument before us and in its testimony before the Commission, that the same rates had 216 been maintained for a long time after this reason had ceased

to exist, and that its effort to discontinue these special rates was not because of the disappearance of this justification, but because the Interstate Commerce Commission had forbidden the special rate to one particular class of shippers. This concession removes all distinguishing force from this alleged unusual reason for the rate, and leaves the *prima facie* evidential force of that rate so far unaffected. The situation is analogous to that concerning which the Supreme Court said (I. C. C. v. L. & N. R. R. Co., *supra*, at p. 99):

"When made, the increase was not because of the absence of water competition, but to make the sum of the locals correspond with the through rates. Under the circumstances, the maintenance of these low rates after the water competition disappeared, tends to support the theory that, by an increase of business or other cause, they had become reasonable and compensatory."

We come next to the claim that the return traffic in the high rate finished product neutralizes the evidential effect of the low inbound rate on raw material. In this position, the railroad company may be right; we do not know. The Railroad Commission was not bound to assume, nor are we, either that this result followed as to inbound grain and outbound whiskey, or that an equivalent result would not follow as to outbound flour from grain inbound to millers, or as to all the reverse traffic which would normally result directly and indirectly from grain moving in one direction. This whole subject was peculiarly one for evidence; at the conclusion of the evidence, it might have been all one way and it might have been so clear and undisputed that a finding against the railroad's contention would have been arbitrary; but the burden was on the railroad to dissipate the evidential effect of its voluntary maintenance of this rate for one purpose; and the railroad did nothing. It results 217 that its admission against its interest remained unaffected and did form a substantial basis for the action of the Commission.

Turning now to the supposed disastrous effect of the new rate upon the general grain traffic for every purpose, the railroad company is met by a similar obstacle.

It has not proved that there is any other traffic of material *or* substantial volume which will be injuriously affected by the new rate, although upon the hearing before the Commission, the railroad was expressly invited to offer any proof it had that it would suffer injury

in this way. Here, again the railroad company asks us to take notice and insists that the Commission should have taken notice of facts which cannot be judicially known. As to many of the interior points where distilleries are located and where the Commission's order takes direct effect or where a similar order will take direct effect, it affirmatively appears that there is no substantial traffic in grain, excepting to these distilleries. A few of the distilleries, however, are in towns or cities of considerable size, and, in the nature of things, there must be some such traffic to mills or to feed stores, etc., and some outbound shipment of locally grown grain from these points; but that this traffic, which perhaps we must presume has some existence, is large enough to be worth any attention or to merit the granting of an extraordinary remedy or indeed to give jurisdiction to this court, does not appear and cannot be assumed.

It does appear by the map that the most distant of the distillery points to be affected are about 90 miles southerly from Cincinnati, and 75 miles southeasterly from Louisville, and if proportionate reductions, on all grain to or from Cincinnati or

218 Louisville and all points intermediate between those cities and the extreme interior distilleries, are eventually compelled under the long and short haul clause of the Kentucky law, it is clear that some additional traffic in grain will be affected; but here, again, we are left without any evidence, and we cannot set aside the Commission's order upon the mere surmise or even probability that there will be a considerable amount of such traffic and the further surmise that the induced return traffic will not be as profitable as distilleries' products. Further, if it is true that the new rate is unremunerative, and that the order compelling the application of that rate to all grain at the distillery points has resulted only from the railroad's mistaken omission to prove its case, we cannot assume that the Railroad Commission would decline to excuse the railroad from the effect of the long and short haul clause. It apparently would have full power to grant such exemption (*L. & N. R. Co. v. Eubank*, 184 U. S. 27).

It follows that there was not, upon the hearing before the Commission, an entire failure of substantial proof to support the order which the Commission made, and that the order cannot, for that cause, be set aside. The rightfulness of this result is emphasized when we consider the conduct of the Railroad at the hearing before the Commission. It was given ample opportunity to produce any proof which it desired, but it deliberately elected to stand upon the supposed inefficiency of the attack on its existing rates, and declined to exert itself to show that they were reasonable or that, if the proposed new rates were put in force, it would suffer any loss of revenue to which it was reasonably entitled. Under such circumstances, the Railroad has scant equity in asking relief from the result of its carefully chosen course.

219 For the reasons which we have stated, we think proper to take up, as if for the first time, the attack upon the reparation order, all the necessary parties being now before the court. The power of the Commission to make a reparation award which should

be, in effect, a money judgment, was left untouched by our previous opinion and by the Supreme Court. Many—perhaps all—of the mooted points have been decided adversely to the Railroad's position, by the Kentucky Court of Appeals, in Illinois Central R. R. Co. v. Paducah Co., Feb. 10, 1914. In so far as this decision is a construction of the state statutes, it is obligatory upon us. It is not entirely clear to us how, if the award is a judicial act, it can be sustained against the provisions of the constitution of 1891, on the theory that this constitution preserved the existing powers of the Railroad Commission, when the supposed power was (except for one provision) equally obnoxious to the Constitution of 1850; but perhaps the Kentucky Court of Appeals would make that clear, if its attention was directed to the question. It may be, also, that its recent opinion should be considered as really holding that the award is not a judgment, but only *prima facie* evidence to be used in the subsequent judicial proceeding. Whatever may be the right conclusion, upon this subject as well as upon others involved in the present attack upon this reparation order, we have concluded that, with the effect of the future rate removed as a basis for equitable relief, there is, in the reparation order itself, however invalid it might be, no sufficient reason for an injunction. The order directs the payment of specifically named sums to 19 separate distilleries.

If there were to be 19 separate suits scattered through the 220 various counties where the distilleries are situated for the recovery of these sums, we might think that the prosecution

of such a multiplicity of suits should be enjoined. However, we are assured by the counsel for the Railroad Commission and all these claimants, that they intend to bring upon this award only one suit, either a combination suit upon the joint and several award or a suit upon one claim, to be prosecuted as a test case, or a consolidated suit, according as they may decide. There is no reason why we should not accept this assurance and base thereon our present action. If this is done, the railroad will not be harrassed by many suits in many different places; it can present, in defense, every objection which it now makes, and if, by the construction which the courts of Kentucky give to the statutes of the state, the railroad is deprived of any right which it has under the laws or constitution of the United States, it can secure that right by the aid of the Supreme Court of the United States. Under these circumstances, we are not inclined to enjoin the railroad Commission or the parties in interest from proceeding in the Kentucky courts according to the form of the Kentucky law; and the motion for such injunction is denied.

Upon the hearing of the former motion, we continued, pending review in the Supreme Court, an order restraining the enforcement of the new rate, and we did this on condition that the railroad company should pay into court, month by month, all the freight charges which it had collected in excess of the rates fixed by the Commission order in question. Our order provided:

"Such money paid into court and subsequent similar payments shall be refunded to the parties paying the excess respectively, if

it shall finally be determined that such excess was not lawfully collected—otherwise, to be returned to the complainant."

This order was made January 12, 1911. Under its terms 221 while the appeal was pending in the Supreme Court, a considerable sum has accumulated. The distillers who paid the freight charges covering these excess amounts so paid into court and who have now been made parties to this case, move for an order that this fund be distributed and returned to them. We do not see how this can be done. It might have been better if our former order had provided for repayment of these amounts if it should "finally be determined that the restraining order was improvidently issued"; but this was not the form of the order. The language which was used provided that the fund should remain in court until the question of the lawfulness of the rate "shall finally be determined." There cannot be a final determination except by final decree; and that has not come. We could set aside or modify this order as to its further effect, but we cannot change what has been done, because the railroad has paid these sums into court upon the condition specified in the order and it is entitled to the observance of that condition. The motion for distribution is denied.

We assume that the railroad company will wish to make another effort to get the Supreme Court to pass upon the question of the supposed lack of evidence before the Commission and will, accordingly, appeal from the order to be entered upon this opinion. This raises the question whether we should again continue the restraining order pending this second appeal. We are not inclined to do so. If the new rate goes into effect pending this appeal, the railroad company will lose some money and the loss will be practically irreparable, but the amount will not be very large, and we think

that to impose that possible loss is a less evil than to permit 222 the railroad company to have longer benefit of the restraining order as the result of its own mistake in presenting its case the first time. This present record can be taken to the Supreme Court in a very few days, and if that court thinks the railroad company should have an injunction under the practice which it followed in *Omaha Co. v. I. C. C.*, 222 U. S., 582, it can speedily give that relief. The existing restraining order will be continued only for the few days necessary for the railroad to notify its agents that the new rate must be applied; and it will then be dissolved.

Filed May 14, 1914, J. W. Menzies, U. S. Clerk.

NOTE.—Total amount paid into court by plaintiff under order or court of Date January 12, 1911, is \$91,150.93.

223 On a day following, to-wit On June 2, 1914, the following order was made and entered herein, *viz*:

In the District Court of the United States for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kobert, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distilling Co., Old Gran Dad Distillery Co., T. M. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair Osborne & Ballard Distilling Co., and Tom Moore Distillery, Defendants.

*Order Granting Appeal.*

The above named complainant, Louisville & Nashville Railroad Company having prayed an appeal from the order denying its application and motion for an interlocutory injunction, in the above styled cause, rendered by this Court on May 14, 1914, to the Supreme Court of the United States, and said complainant having presented and filed its Petition for Appeal, together with its 224 Assignment of Errors and an Appeal Bond, all of which have been and are hereby duly approved:

It is now ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record and proceedings upon which said order of May 14, 1914, was made, duly authenticated, be sent to the Supreme Court of the United States, as prescribed by law, and in accordance with the præcipe, which shall be after notice to defendants or their Solicitors filed with him by the complainant.

It is further ordered by the Court that a citation be issued, admonishing the defendants to be and appear in the Supreme Court of the United States within thirty (30) days from this date. June 2, 1914.

Enter:

A. C. DENISON,  
*Circuit Judge, Sitting by Designation as District Judge.*

225 Said Notice referred to in the foregoing order and filed on June 2, 1914, is as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky.

No. 686. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kober, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., & T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, & Old Gran Dad Distillery Co., Defendants.

*Notice.*

The defendants and their solicitors will take notice that the complainant will on Tuesday, June 2, 1914, at or about the hour of 9 o'clock, A. M. in the office of the clerk of the Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, tender and offer to file before Honorable Arthur C. Denison, Circuit Judge sitting by designation as District Judge in the above styled case, its petition for appeal to the Supreme Court of the United States from the order entered May 14, 1914, denying to complainant an interlocutory injunction as prayed for in its bill as amended, its assignment of errors and appeal bond and to enter an order filing said petition for appeal and assignment of errors allowing said appeal and approving said bond and directing citation to be issued as prescribed by law.

This June 1, 1914.

WILLIAM A. COLSTON,  
EDWARD S. JOUETT,  
HENRY L. STONE,  
*Attorneys for Complainant.*

226 Service of above notice and receipt of copy of petition for appeal, assignment of errors, appeal bond and proposed order filing said appeal and assignment of errors and approving said bond and directing citation to issue hereby acknowledged.

This June 1, 1914.

EDWARD W. HINES,  
J. V. NORMAN,  
*Solicitor for Defendants.*

June 2, 1914. J. W. Menzies, U. S. Clerk.

227 Said Petition for Appeal filed by the foregoing order on June 2, 1914, is as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky.

No. 686. In Equity.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, & WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kober, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. M. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair Osborne & Ballard Distilling Co., and Tom Moore Distillery, Appellees.

*Petition for Appeal to the Supreme Court of the United States.*

To the Honorable the Judges of the District Court of the United States for the Eastern District of Kentucky:

Your petitioner, the Louisville & Nashville Railroad Company, complainant and appellant in the above styled cause, conceiving itself aggrieved by the order of this court, rendered May 14, 1914, denying, after notice and hearing, its application and motion for an interlocutory injunction against the said appellees and defendants herein, does hereby appeal from said order to the Supreme Court of the United States, in accordance with the provisions of Section 266 of the Judicial Code as amended, for the reasons and upon the grounds specified in its Assignment of Errors, presented and filed herewith.

228 Wherefore, your petitioner prays for an order allowing its said appeal, and that a transcript of the record and proceedings, upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, as prescribed by law.

June 2, 1914.

WILLIAM A. COLSTON,  
EDWARD S. JOUETT,  
HENRY L. STONE,  
*Solicitors for Appellant.*

Lodged with me, this June 2, 1914.

A. C. DENISON,

*Circuit Judge, Sitting by  
Designation as District Judge.*

Filed June 2, 1914. J. W. Menzies, U. S. Clerk.

229 Said Assignment of Errors filed by the foregoing order on June 2, 1914, is as follows, viz:

In the District Court of the United States for the Eastern District of Ky., at Frankfort.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,  
vs.

LAURENCE B. FINN, GREEN GARRETT & WM. KLAIR, Individually and as Constituting the Railroad Commission of Ky., and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kobert, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distilling Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair Osborne & Ballard Distilling Co., and Tom Moore Distillery, Appellees.

*Assignment of Errors.*

And now on this the 2nd day of June 1914, comes the complainant and appellant, Louisville & Nashville Railroad Company, by Wm. A. Colston, Edward S. Jouett, and Henry L. Stone, its Solicitors, and says that in the order rendered by the court in the above styled cause May 14, 1914, denying, after notice and hearing, its application and motion for an interlocutory injunction against said defendants and appellees, in accordance with the prayer of its original bill as amended, and the terms and provisions of the restraining order granted September 7, 1910, upon the filing of its said bill herein, and in the record and proceedings in said cause in this court, there is manifest error as set forth in this, its Assignment of Errors, which is presented and filed simultaneously with its Petition for Appeal and this court erred in denying its said application and motion as follows:

In not granting its said application and motion for an interlocutory injunction, because the McChord Act of the Legislature of Kentucky, approved March 10, 1900, entitled "An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions," and the order of August 10, 1910, made by the appellees in pursuance of said Act herein complained of, are violative of the provision of Section One

(1) of Article XIV of the Amendments to the constitution of the United States, which prohibits any State from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, and because the enforcement of said order of August 10, 1910, unless enjoined herein, will operate to deprive complainant and appellant of its property without due process of law, and to deny to it the equal protection of the laws.

## II.

In not granting the application for an interlocutory injunction, because the order of the Kentucky Railroad Commission made August 10, 1910, fixing the rates to be observed by appellant "for like services thereafter rendered" with respect to the several commodities from the points of origin to the points of destination therein named, because the finding of said Commission, as shown by the "Transcript" of all the evidence introduced or heard before said Commission on the complaint of the appellees, Greenbrier Distillery Co. and others, against the appellant, filed as an Exhibit with appellant's amended bill, January 8, 1914, was contrary to the 231 indisputable character of the evidence, and, furthermore, the facts, as shown by said "Transcript," do not, as a matter of law, support the rate order aforesaid.

## III.

In not granting the interlocutory injunction prayed for on the ground that there was (as said "Transcript" shows) no evidence, or no substantial evidence, to support said rate-making order and to support the finding of said Commission that appellant's then existing standard rates were unreasonable, or that the special rates prescribed by said Commission for the future were reasonable.

## IV.

In holding that the maintenance of special rates on grain and other commodities for the use of distillers prior to March 25, 1910, (when appellant's standard rates were applied thereon), alone constituted evidence, or substantial evidence, to support said rate-making order and the rates prescribed thereby as reasonable for like services thereafter to be rendered, and in denying appellant's application for an interlocutory injunction on that ground.

## V.

In denying the interlocutory injunction prayed for, so far as concerned all outbound shipments of grain, viz: corn, rye, barley and malt, when not used by distillers at destinations, but consigned to others for general purposes, because there was in the complaint no averment, and in the evidence introduced and heard before said Commission no proof whatever that appellant's standard rates

232 charged and collected on that class of shipments both prior and subsequent to March 25, 1910, were unreasonable or that appellant's special rates charged and collected on such grain when used by distillers, or those prescribed in said rate making order, were reasonable when made applicable, as said order does, to shipments of such grain to other consignees or the general public at the sixteen several points of destination, and to which latter class of shipments appellant had not at any time applied such special rates, or other than its standard rates, in force and effect thereon at all times prior to the promulgation by said Commission of its said rate-making order of August 10, 1910, and, furthermore, the interlocutory injunction should have been granted by the court because as to the rates on outbound shipments of grain to consignees other than distillers at said points of destination said Commission was without any jurisdiction whatever, there being no complaint, notice or hearing thereon, and said rate-making order, in any event, in so far as it purports to fix rates for future observance by appellant on that class of shipments of corn, rye, barley and malt is arbitrary and absolutely void.

## VI.

In denying appellant's application for an interlocutory injunction, and allowing the straight special rates, fixed by said rate-making order, to go into force and effect, when the evidence and record, without contradiction, showed such special rates had never been prior to the making of said order applied even on the distillery grain or supplies stated therein, but that prior to March 25, 1910, appellant had always charged and collected, its standard rates on such grain and commodities as shipped, and allowed to distiller at the points of destination, at the end of each month, a refund of the amount collected of such standard rates only to the extent said distillers showed by their written statements and certificates they had used in the manufacture and shipment of whisky, at their respective plants, the grain and commodities on which they had paid said standard rates, the net amount of the latter left 233 being equivalent to the special rates aforesaid. The court, therefore, erred in holding the fact that appellant had carried out this arrangement with the distillers at the points of destination for sometime prior to March 25, 1910, was *prima facie* evidence, or substantial evidence, of the unreasonableness of appellant's said standard rates in force and effect and applicable to all consignees on August 10, 1910, or of the reasonableness of the straight one-way rates prescribed by said Commission on the latter date upon such grain and commodities, without regard to whether the same is used in the manufacture and shipment of whisky, and without regard to whether the consignees are distillers or use such grain for purposes other than the manufacture of whisky.

## VII.

In not granting the interlocutory injunction as prayed for, because the rates fixed by the order of said Commission were arbit-

trarily made, on account of the following facts shown by the said "Transcript" before said Commission beyond controversy, to wit:

1. The evidence was confined to three way-stations and the town of Bardstown on the Bardstown Branch, and to one way-station on the Lebanon Branch of the appellant's railroad.

2. Not a witness was introduced by the appellees who professed to have any experience, or any knowledge of any facts, proper to be considered in determining the reasonableness of railroad rates, and no evidence whatever was offered upon that subject by any witness, except the evidence as to the Southern Railway Company's rates to the distillery points of Tyrone, Lawrenceburg and Harrodsburg and the statement of one or two of the distillers who merely gave it as their opinion that it was "unreasonable" to raise the rates from the special rates to the regular standard rates.

234 3. The only evidence offered as to the Southern Railway

Company's rates related to the three distillery points of Tyrone, Lawrenceburg and Harrodsburg, which are located near each other, and which the Assistant General Freight Agent of the Southern said had been fixed because of water competition and of the desire of his company to foster the distillery interests. He was supported in this statement by the uncontradicted statement that the rate on grain from Louisville to Shelbyville over the Southern, a distance of 40 miles, was 8 cents, as against the rate of 5 cents to Tyrone, Harrodsburg and Lawrenceburg, nearly twice as far away. In other words, they selected for a comparison three distillery points, near each other, on another railroad where the rates were not claimed to be reasonable *per se*, but to have been fixed at a lower rate than that company's rate because of the two considerations above named.

4. The only other evidence offered was to the effect that the Louisville & Nashville Railroad Company had maintained these special rates to distilleries, by the season to season adjustment and the plan of refunds, for 10 to 11 years. The record throughout shows that this was not only the gravamen of the distillers' complaint, but that either it was considered the only evidence necessary, or it was found to be the only evidence obtainable, in support of their contention.

5. Out of 16 places to which the rates were reduced to the former special rates, as to 11 of them, namely Chicago (Ky.), Coon Hollow, Deatsville, Early Times, Eminence, Gethsemane, Hobbs, Lebanon, Loretto, Samuels and Silver Creek, there was not only no evidence whatever relating to the reasonableness or unreasonableness of the rates thereto, but their names were not even mentioned in the testimony.

235 6. In the case of three of the places to which the rates were reduced, namely, Bardstown, Coon Hollow and Silver Creek, the order reduced the rates not only from Louisville to those points, but also from Covington and Newport, and yet there was no evidence of any sort offered as to the rates from either Covington or Newport, or as to the lines of railroad, namely, the Cincinnati Division to Coon Hollow and Bardstown, and the Kentucky Divi-

on, commonly called the Kentucky Central, from Newport and Covington to Silver Creek. In fact, neither the name of Covington nor Newport was ever mentioned at the hearing.

Eminence, Ky., is a town with a population of about 1,274 people as shown by the last census. It is situated 40 miles from Louisville on the line between Lexington and Louisville, officially known as the Lexington Branch of the Louisville, Lexington and Cincinnati Division, yet the name of neither the town nor the line of railroad was mentioned in the evidence.

The so-called evidence was thus narrowed down to the meager comparison with the Southern rates to like distillery points and to the proof bearing upon the loss that will be sustained by the distillery companies by discontinuing the refunds, or, in other words, by putting their rates on a parity with the rates to other shippers on like commodities.

### VIII.

In not granting the interlocutory injunction, because the rate-making order complained of undertakes to fix and prescribe rates for appellant's services thereafter rendered for all time, without limitation, thus permanently depriving appellant of the power to fix its rates, however reasonable they may be, upon the commodities carried from the points of origin to the points of destination named in said order, with no possible hope for relief from this condition or to increase its rates on such commodities from said points to said

points, unless the said Commission, in the exercise of its own 236 discretion, consents thereto, or, on application of appellant, chooses to revoke or modify its said order; but, if it refuses so to do, however strong the evidence offered may be to justify or induce it to consent or authorize such increase as just and reasonable, appellant is remediless in the premises under the provisions of the McChord Act of March 10, 1910, Sec. 820a, Kentucky Statutes, as construed and administered by said Commission, a non-judicial body, which Act of the State thus operates to deprive appellant of its property without due process of law, and to deny to it the equal protection of the laws, in violation of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and the court herein erred in not so holding.

### IX.

In not granting the interlocutory injunction applied for against the enforcement of said Commission's order awarding so-called reparation in certain sums therein set out in favor of the appellee distillery corporations, or either of them, on the ground that Sec. 829, Kentucky Statutes, in so far as it attempts to vest in said Commission, which is a non-judicial body, power or authority to make such an award, violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

### X.

In not granting appellant's application for an interlocutory injunction enjoining the enforcement by said Commission of its order

awarding so-called reparation in sundry sums to the corporations named in said order, which are parties defendant and appellees herein, and enjoining the Chairman of said Commission 237 from filing a copy of said awards and the evidence heard by said Commission in the office of the clerk of the circuit court of any county in the State of Kentucky, on the ground that said awards are arbitrary, no evidence having been heard or introduced in said investigation by said Commission or on notice to appellant as to the amount, if any, the complainants, or either of them, in said proceeding before said Commission claimed to have paid to appellant as alleged unjust, unreasonable or extortionate rates on the commodities aforesaid, between March 25 and August 10, 1910.

## XI.

In not granting appellant's application for a temporary injunction enjoining the said Commission from enforcing said reparation order, or the Chairman from filing a copy of said awards and the evidence heard as aforesaid in the office of the clerk of the circuit court of any county in the State of Kentucky, because there is no valid statute of the State of Kentucky granting power of authority to said Commission to make, promulgate or enforce the said order awarding reparation to the parties instituting the proceeding before it in which said order was entered, Section 829, Kentucky Statutes (the only statutory provisions bearing on the subject of reparation), being unconstitutional and void on its face, as violative of both the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution, by reason of the qualifying provision therein, with respect to the trial in the circuit court, upon the filing of a certified copy of such award and the evidence heard by the Commission, as follows:

"If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the Commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the Commission by the exercise of reasonable diligence."

## 238 XII.

In not sustaining appellant's application for an interlocutory injunction on the ground that said Commission exceeded its powers and jurisdiction in the premises by promulgating said rate-making order of August 10, 1910, thereby undertaking to regulate and control the policy of the appellant in fixing its own rates, and to substitute for a just and reasonable rate a lower rate, either on the ground of policy or on the ground that appellant was by its former conduct estopped from charging and collecting a reasonable rate, the complainants, Greenbrier Distillery Co., and others, in their complaint and testimony before said Commission, as shown by said "Transcript" of evidence, not having really complained of appellant's standard or higher rate made effective March 25, 1910,

because it was intrinsically an unreasonable rate, but because, although reasonable, the appellant was estopped to advance it on account of having maintained the lower rate by refunding on monthly statements and certificates the difference or excess between appellant's standard rates and certain special rates, for a considerable period, so it was beyond the power of said Commission to direct a restoration of the prior rates, less such refunds; and said rate-making order, on its face, in connection with the complaint of said Greenbrier Distillery Company and others and said "Transcript," shows the rates fixed thereby were made on the theory that the appellant was estopped to increase its rates to said complainants on grains and other distillery supplies, in view of the circumstances, under which the same had been originally put into force and effect and thereafter maintained until March 25, 1910.

### XIII.

In not granting appellant's application for an interlocutory injunction enjoining the enforcement of said order making 239 awards for so-called reparation in order to avoid a multiplicity of suits, which the court admits in its opinion may be brought in various counties by the corporate appellees against appellant, but relies on the voluntary assurance of said appellees' counsel, without consideration that they will not do so, and from which they or their clients may lawfully recede at any time and resort to the remedy by separate suits at law in different circuit courts, claimed to exist in their behalf under Sec. 829, Kentucky Statutes, from which multiplicity of suits on said reparation order appellant has no protection or adequate remedy at law, the said appellees having no power or authority of law under the Civil Code or laws of the State of Kentucky to bring as the court erroneously seems to think they have, "only one suit, either a combination suit upon the joint and several award or a suit upon one claim, to be prosecuted as a test case, or a consolidated suit, according as they may decide," when said award is not joint, but several and for a separate amount to each of said appellees to whom an award was made by said Commission, and a separate proceeding will necessarily have to be taken thereon by each of said appellees, as provided in said Sec. 829.

### XIV.

In declining to continue in force and effect, pending the appeal to the Supreme Court herein, the restraining order granted on September 7, 1910, herein, and in dissolving the same to take effect upon the 30th day of May, 1914.

Wherefore, the appellant, Louisville & Nashville Railroad Company, prays that the order of the District Court of the United States for the Eastern District of Kentucky, entered herein May 14, 1914, 240 denying appellant's application and motion for an interlocutory injunction herein, be reversed, and that said District Court be directed to grant said application and motion for an interlocutory injunction in accordance with the prayer of

the original bill as amended, and substantially in the terms of the restraining order of September 7, 1910.

June 2, 1914.

WILLIAM A. COLSTON,  
EDWARD S. JOUETT,  
HENRY L. STONE,  
*Solicitors for Appellant.*

Filed Jun- 2, 1914, J. W. Menzies, U. S. Clerk.

241 Said bond on Appeal filed and Approved by the foregoing order of June 2, 1914, is as follows, viz:

United States District Court for the Eastern District of Kentucky,  
at Frankfort.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,  
vs.

LAURENCE B. FINN, GREEN GARRETT, and WILLIAM KLAIR, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kobert, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distilling Co., T. W. Samuels Distillery Co., Warwick Distillery Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, Appellees.

*Bond on Appeal.*

Know all men by these presents: That the undersigned, Louisville & Nashville Railroad Company, appellant, as principal, and Citizens Trust & Guaranty Company of West Virginia, a corporation duly incorporated and organized under the laws of the latter State, and authorized and empowered to become surety on all bonds in judicial proceedings and to transact business in the latter State and in the State of Kentucky, as surety, are held and firmly bound unto the appellees, Laurence B. Finn, Green Garrett and William Klair, Individually and as constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kobert, S. Grabfelder & Co., Willow Springs Distilling Co., Wright & Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks

242 Spring Distillery Co., W. B. Samuels & Co., M. C. Beam & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, in the sum of Five Hundred (500)

Dollars, to be paid to the said appellees, and bind their successors and assigns, firmly by these presents.

Sealed with the official seals of said Companies, and dated June 2, 1914.

Whereas, The appellant, Louisville & Nashville Railroad Company, in the above styled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the order rendered and entered in said cause and District Court on May 14, 1914.

Now, therefore, the condition of this obligation is such that, if the said appellant shall prosecute said appeal to effect and answer all costs, if it fails to make said appeal good, then this obligation shall be void; otherwise, to remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD  
COMPANY,

[SEAL.] By W. L. MAPOTHER, *First Vice-president.*

Attest:

J. H. ELLIS, *Secretary.*

CITIZENS TRUST & GUARANTY COM-  
PANY OF WEST VIRGINIA.

By R. P. WILLIAMS. [SEAL.]

The foregoing bond is approved, this June 2, 1914.

A. C. DENISON,

*Circuit Judge, Sitting by Designation  
as District Judge.*

Filed June 2, 1914. J. W. Menzies, U. S. Clerk.

243 On the same day, to-wit, on June 2, 1914, the following Citation was issued herein, and the same was filed on June 10, 1914, with the acceptance of service thereof endorsed on the bottom thereof, viz:

United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA,  
*Eastern District of Kentucky.*

To Laurence B. Finn, Green Garrett, and William Klair, Individually and as Constituting the Railroad Commission of Kentucky, and Greenbrier Distillery Co., Clear Springs Distilling Co., Early Times Distilling Co., Mueller, Wathen & Kobert, S. Grabfelder & Co., Willow Springs Distilling Co., Wright and Taylor, Taylor & Williams, Eminence Distillery Co., Old Gran Dad Distillery Co., T. W. Samuels Distillery Co., Warwick Distilling Co., Burks Spring Distillery Co., W. B. Samuels & Co., M. C. Bean & Co., Head & Parker, Blair, Osborne & Ballard Distilling Co., and Tom Moore Distillery, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within

thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Eastern District of Kentucky, and filed in the Clerk's office of said Court on the Second day of June, A. D. 1914, in a cause wherein Louisville & Nashville Railroad Company is appellant, and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, (the order denying appellant's application and motion for an interlocutory injunction in this case, rendered by this Court on May 14, 1914), as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand as Circuit Judge, Sitting by Designation as Judge of the said District Court, and the Seal of said Court, at Frankfort, this 2nd day of June in the year of our Lord one thousand nine hundred and fourteen and of our Independence the 138th year.

[SEAL.]

ARTHUR C. DENISON,  
*Circuit Judge, Sitting by Designation as  
 Judge of the U. S. District Court, Eastern  
 District of Kentucky.*

I hereby accept service of the within citation this 9th day of June, 1914.

J. V. NORMAN,  
*For Appellees.*  
 JAMES GARNETT,  
*Attorney General.*

Filed June 10, 1914. J. W. Menzies, U. S. Clerk.

244 On a day following, to-wit; On June 10, 1914, the following Praecept for Transcript of Record was filed herein, viz:

United States District Court for the Eastern District of Kentucky.

No. 686.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,  
 vs.  
 LAURENCE B. FINN et al., Defendants.

*Praecept for Transcript of Record.*

To Charles N. Wiard, Deputy Clerk of the District Court of the United States for the Eastern District of Kentucky, at Frankfort:

Please prepare forthwith a certified transcript of the record in the above styled cause for the appeal of the complainant from the interlocutory order or decree made and entered on May 14, 1914, denying the application of the complainant after notice and hearing.

for an interlocutory injunction as prayed for in the bill as amended, which record should consist of the following:

The original bill of complaint, with Exhibits A, B, C, and D therewith.

Restraining order granted by Judge Cochran, September 7, 1910.

Order of Court entered, September 26, 1910.

Affidavits of C. B. Compton and D. M. Goodwyn, filed by complainant, September 26, 1910.

Affidavits of Adam T. Siler, Laurence B. Finn, W. A. Miller and R. H. Edelen, filed by defendants, September 26, 1910.

Demurrer to whole bill, filed September 26, 1910.

Demurrer to part of bill, filed September 26, 1910.

Order of Court entered November 3, 1910, hearing on application for interlocutory injunction, etc.

Amended bill filed November 3, 1910.

Demurrer to whole bill as amended, filed November 3, 1910.

245 Order of Court, entered January 9, 1911, filing opinion.

Opinion found in 186 Fed. 176-204, need not be copied.

Supplemental opinion and order, entered Jan'y 12, 1911.

Second amended bill, filed Jan'y 12, 1911, omitting exhibits Nos. 1, 2, 3, and 4 therewith.

Order of Court, entered January 12, 1911, in pursuance of opinion, and from which former appeal was taken.

Order entered February 6, 1911, concerning money then paid into court, omitting written statement filed showing separate amounts.

Amended and Supplemental bill filed Jan'y 8, 1914.

Exhibit therewith marked "Transcript", showing proceedings and all the testimony offered or introduced before the Kentucky Railroad Commission, upon the complaint of the Greenbrier Distillery Company and other distillery companies against the Louisville & Nashville Railroad Company, in which the rate-order and reparation-order were entered by said Commission August 10, 1910.

Affidavit of Stenographer or Reporter of said Commission, appended to said Transcript.

Temporary restraining order granted by District Judge upon the filing of said amended and supplemental bill.

Return of marshal thereon, showing service thereof.

Notice of time and place of application for interlocutory injunction, accepted by Governor and Attorney General.

Mandate of Supreme Court on former appeal, omitting opinion of Supreme Court found in 231 U. S. 298-320.

All orders of court herein, upon and since the filing of said mandate, including the opinion and order denying the complainant's application for an interlocutory injunction, entered May 14, 1914.

246 The Clerk will omit all monthly reports of amounts collected on freight rates in excess of the rates fixed by said Commission in its order of August 10, 1910, but stating the total amount paid into court by complainant on account of such excess.

The Petition for Appeal, Assignment of Errors, Appeal Bond,

and Order of Court filing the same, approving said Bond, and allowing Appeal, entered June 2, 1914.

Citation issued June 2, 1914 and Acceptance of same, June 9, 1914.

Præcipe for transcript of record and acknowledgment of receipt of copy thereof.

This June 9, 1914.

WILLIAM A. COLSTON,  
EDWARD S. JOUETT,  
HENRY L. STONE,  
*Solicitors for Complainant and Appellant.*

The defendants and appellees hereby acknowledge the receipt of a copy of the foregoing præcipe of the complainant and appellant, and agree that it indicates and includes all the portions of the record necessary to be incorporated into the transcript upon the complainant's appeal therein referred to.

Dated this June 9th, 1914.

JAMES GARNETT,  
*Attorney General;*  
E. W. HINES,  
J. V. NORMAN,  
*Solicitors for Defendants and Appellees.*

Filed June 10, 1914. J. W. Menzies, U. S. Clerk.

247 UNITED STATES OF AMERICA,  
*Eastern District of Kentucky, ss:*

I, John W. Menzies, Clerk of the District Court of the United States for the Eastern District of Kentucky, do hereby certify the foregoing 246 pages to be a full, true and correct transcript of the record in the case of Louisville & Nashville Railroad Company, Complainant, and Laurence B. Finn, Green Garrett and William Klair, individually and as constituting the Railroad Commission of Kentucky, and others, Defendants, in Equity No. 686, as required by the præcipe of Complainant, the party appealing the case, as the same appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand as Clerk of the aforesaid Court, and affixed the seal thereof, at Frankfort, in said District, this 29th day of June, A. D., 1914, and of the Independence the 138th year.

[Seal United States of America Eastern K'ty Dist. Court.]

JOHN W. MENZIES,  
*Clerk United States District Court,*  
*Eastern District of Kentucky,*  
By CHAS. N. WIARD, D. C.

Endorsed on cover: File No. 24,290. E. Kentucky D. C. U. S. Term No. 546. Louisville & Nashville Railroad Company, appellant, vs. Laurence B. Finn, Green Garrett, and William Klair, individually and as constituting the Railroad Commission of Kentucky, et al. Filed July 2d, 1914. File No. 24,290.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* FINN AND OTHERS AS RAILROAD COMMISSION OF KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 546. Argued December 11, 14, 1914.—Decided January 5, 1915.

Where the jurisdiction of a Federal court is invoked because of questions raised under the Federal Constitution it extends to the determination of all questions presented, irrespective of the disposition that may be made of the Federal questions or whether it is necessary to decide them at all. *Ohio Tax Cases*, 232 U. S. 576.

While the rule applicable to the Interstate Commerce Commission that an order made indisputably contrary to the evidence, or without any evidence, is arbitrary and subject to be set aside, may also be applicable to orders of the Kentucky Railroad Commission, in this case *held*, that there was substantial evidence to support the order establishing rates and the Commission had jurisdiction under the McChord Act to make the order reestablishing a former rate.

Where the evidence shows that special rates on a particular commodity were voluntarily established and were maintained for many years after the avowed reason for introducing them had ceased to exist, and the carrier's reason for an advance was not because they were inadequate but because they gave rise to discrimination, there is a reasonable inference that the advanced rates are unreasonably high which is sufficient to give jurisdiction to the Kentucky Railroad Commission under the McChord Act to make an order reestablishing the original rates and to support the conclusion that such rates were remunerative and should be reestablished.

Where, in a proceeding before a state Railroad Commission, complaining shippers specified the amount of extortionate charges for which

reparation was prayed and the carrier admitted the rates had been charged and denied liability for reparation solely on the ground that the rates were reasonable, and there was evidence to support the charges that the rates were extortionate, and the record does not show that the carriers were denied an opportunity to introduce evidence, this court will not declare that an order of reparation was contrary to the due process provision of the Fourteenth Amendment, either because of lack of evidence on which to base the amounts ordered to be paid or because, under the statutory procedure, there was no formal issue, or because the statute does not provide for compulsory production of evidence either before the Commission or in any subsequent trial before the court.

This court does not pass upon moot questions, and one seeking to strike down a state statute as unconstitutional must show that he is within the class with respect to whom it is unconstitutional, and that he has been injured by the unconstitutional feature.

Where the record does not show that the party complaining suffered for lack of compulsory process or that he will be prevented in a subsequent trial from producing evidence, he cannot be heard to object to a statute as unconstitutional because it does not provide for compulsory process or contains restrictions on admission of evidence.

214 Fed. Rep. 465, affirmed.

THE facts, which involve the validity of orders of the Kentucky Railroad Commission establishing rates and awarding reparation and the constitutionality of the statute under which the orders were made, are stated in the opinion.

*Mr. Edward S. Jouett* and *Mr. William A. Colston*, with whom *Mr. Henry L. Stone* was on the brief, for appellant.

*Mr. Edward W. Hines*, with whom *Mr. J. V. Norman*, *Mr. James Garnett*, Attorney General of the State of Kentucky, and *Mr. Charles C. McChord* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case was here on a former occasion (*Louisville & Nashville R. R. v. Garrett*, 231 U. S. 298), when an order

denying a motion for an interlocutory injunction was affirmed. The suit was brought by the Railroad Company to enjoin the enforcement of two orders made August 10, 1910, by the Railroad Commission of Kentucky, one of which prescribed maximum rates of freight upon certain intrastate traffic, and the other awarded specified amounts in reparation for payments previously exacted by the carrier for freight transportation in excess of the rates thus established by the Commission as reasonable. One of the grounds of attack upon the rate order was that the Commission had acted arbitrarily, in that there was no evidence before it tending to establish that the rates which the company had maintained were unreasonable. Upon the former appeal we held that since it appeared that there had been a hearing before the Commission with evidence adduced on each side, and since this was not produced before the court, the general allegations of the bill respecting the effect of the evidence, and the statements contained in the affidavits submitted upon the application for injunction, were insufficient to justify the court in enjoining the rates upon the ground that the Commission either had denied the hearing which the statute contemplated, or by its arbitrary action had been guilty of an abuse of power. With respect to the reparation order we sustained the action of the court below in declining to determine its validity, upon the ground that the persons in whose favor the award was made had not been brought in as parties.

After our decision, appellant filed an amended and supplemental bill bringing in as defendants the parties in whose favor reparation was awarded, stating with more particularity the grounds upon which that order was attacked, and, with respect to the rate order, setting out as an exhibit a transcript of the evidence introduced before the Commission. Upon this amended and supplemental bill appellant again moved for an interlocutory injunction.

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The motion was heard before three judges, under § 266, Judicial Code (36 Stat. 1162, c. 231), the application for injunction was denied (214 Fed. Rep. 465), and the case comes here by direct appeal taken pursuant to the provisions of the same section.

The jurisdiction of the Federal court was invoked because of questions raised under the Constitution of the United States, and not because of diversity of citizenship; but it extends, of course, to the determination of all questions presented, irrespective of the disposition that may be made of the Federal questions, or whether it is necessary to decide them at all. *Ohio Tax Cases*, 232 U. S. 576, 587, and cases cited.

The action of the Commission was based upon Kentucky Statutes (Carroll): § 816, defining what shall be deemed extortion by a railroad corporation in charging toll or compensation for intra-state transportation; § 820a (the "McChord Act"), authorizing the Commission, upon complaint made against a railroad company for charging extortionate freight or passenger rates, to hear the matter and, if it determines that the company has been guilty of extortion, then to establish a just and reasonable rate for services thereafter to be rendered; and § 829, authorizing the Commission to hear and determine complaints under § 816 and to render such award as may be proper.

It appears that for many years prior to March 25, 1910, the railroad company had voluntarily maintained special rates for the transportation of corn, rye, barley, and malt, and empty barrels, boxes, etc., from three points of origin upon the Ohio River—Louisville, Covington, and Newport—to points of destination in the interior of the State; these rates being allowed only to owners of distilleries, when the commodities in question were used as raw materials or supplies. On the date mentioned, the carrier withdrew these special rates and substituted what are

described as the "standard rates," being the same that had been theretofore charged to others than distillers. Thereupon numerous distillery companies complained to the Commission, insisting that the new rates were exorbitant and that the former rates were just and reasonable. After a hearing the Commission sustained the contention of the petitioners and established the maximum rates now in question, these being the same as the special rates, which, prior to March 25, 1910, the carrier had given to the distillery companies; but by the Commission's order they were made to apply to the commodities mentioned, without regard to the use that was to be made of them.

The McChord Act, under which the rate order was made, is set forth in *Siler v. Louisville & Nashville R. R.*, 213 U. S. 175, 178. It provides for notice to the carrier, stating the nature of the complaint or matter to be investigated, and the time and place of hearing it, and requires the Commission to hear such statements, argument, or evidence offered by the parties as the Commission may deem relevant. Section 829 likewise requires notice of the hearing to be given to the company; the evidence is to be reduced to writing together with the award, and they are to be filed in the office of the clerk of a designated court, and a summons is to be issued requiring the company to appear and show cause why the award should not be satisfied. If the parties fail to appear, judgment is rendered by default; but if trial is demanded, the case is to be tried as ordinary cases are, except that no evidence shall be introduced by either party other than that heard by the Commission or such as the court shall be satisfied could not have been produced before the Commission by the exercise of reasonable diligence. The judgment and proceedings thereon are to be the same as in ordinary cases. Since the case was here before, the Court of Appeals of Kentucky, in *Illinois Central R. R. v. Paducah*

*Brewery Co.*, 157 Kentucky, 357, has passed upon § 829, upholding its validity under the state and Federal constitutions, and construing it as authorizing the Commission to award reparation in money.

The contentions now made by appellants are reducible to two; first, that the rate order is invalid because not supported by substantial evidence; and, second, that the reparation order is invalid for the same reason, and also because the statute pursuant to which it was made violates the "due process" clause of the Fourteenth Amendment.

To deal first with the rate order. In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91, 92. It is contended that the "due process" provision of the Fourteenth Amendment imposes a like rule of procedure upon the States with respect to their exercise of the legislative power of rate-making.

We find it unnecessary to pass upon this question. The McChord Act, like the Interstate Commerce Act, contemplates that the Commission bases its determination upon the evidence adduced before it; and it may at least be assumed that the rate order must be held invalid unless it was founded upon substantial evidence. But we agree with the court below that there was substantial evidence to support the order. At the hearing, a Mr. Goodwyn was produced by the company, and made a statement of the facts in its behalf—not under oath, but it was received as evidence in behalf of the company—in substance

that the special rates maintained prior to March 25, 1910, had been introduced more than thirty years before in order to encourage the distillery business along the line of the railroad; that the rates were not raised when the business of the distilleries became prosperous, but were continued as long as the railroad company could continue them with justice to itself, that is to say, to the point where prosecution was threatened by the Interstate Commerce Commission for alleged discrimination, and that in order to remove the discrimination the company had raised the rates charged on grain for distillery purposes in order to make them correspond with those charged on grain used for other purposes. These grain rates were the chief bone of contention. There was some other evidence, but not very much, that bore directly upon the question of the reasonableness of the rates; but it should be said that full opportunity was afforded to the railroad company to adduce such evidence as it desired. And since it appeared that the company, long prior to March 25, 1910, had voluntarily established the comparatively low rates upon a substantial part of their traffic, had maintained them for many years after the reason assigned for originally introducing them had ceased to exist, and had then withdrawn them, not upon the ground that they were inadequate, but because they gave rise to discrimination, and in so doing had introduced rates very much greater, it seems to us that the conduct of the carrier, in the absence of some explanation more conclusive than any that was made, was sufficient basis for a reasonable inference that the special rates in force prior to March 25 upon the distillery supplies were reasonable and adequate compensation for that and other similar traffic, and that the rates thereafter charged were unreasonably high to the extent of being extortionate. *Interstate Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 99. This was sufficient to give jurisdiction to the Commission under the

McChord Act, and to support the conclusion that it reached.

As to the reparation order, it is further insisted (a) that there was no evidence before the Commission to show that the several parties to whom reparation was awarded had paid freights based upon the rates complained of, or to show the amounts of their payments, or to show that the difference in the freight payments represented damages to which they were entitled; and (b) that so much of the statute (§ 829) as undertakes to provide the procedure for recovering reparation is contrary to the "due process" provision of the Fourteenth Amendment, because in the proceeding before the Commission there is no formal issue and no method of requiring the production of evidence, while in the subsequent trial before the court based upon the Commission's award there is no right to adduce evidence other than such as was presented to the Commission, unless the court shall first be satisfied that the evidence is such as could not have been produced before the Commission with the exercise of reasonable diligence.

From the record, however, it appears that in the petition filed by the distillers and distillery companies before the Commission it was alleged that since March 25, 1910, each of the petitioners had been subjected to extortionate charges collected from them by the railroad company, and for which an award of reparation was prayed; the respective amounts thus claimed being particularly specified. The answer of the company admitted that the rates mentioned had been charged, collected, and received by it, but denied that they were extortionate, unjust, or unreasonable, and upon this ground, and no other, denied liability to make reparation. The transcript of the testimony taken before the Commission shows that the several reparation claims were presented, and the following colloquy occurred respecting them: "Mr. McChord (counsel for petitioners): 'Is there any question made as to

the amount of those claims?' Mr. Goodwyn: 'We never checked them.' Mr. Dearing (counsel for the railroad company): 'My idea is that the Commission can easily check them, and you and I can check them if we come to the position that they are entitled to the reparation.' Mr. McChord: 'You deny it all?' Mr. Dearing: 'Yes.' Mr. McChord: 'I will put all these claims in as exhibits. Some of these have not been made up by the complainants, and we will want to fill them in later.' Mr. Dearing: 'That will be all right.' Mr. McChord: 'Shall I put them in now?' Mr. Siler: 'Yes, or at any time.'" In short, the record shows that the only question made respecting the reparation claims was the general contention that the rates charged by the company were in fact not unreasonable or extortionate; and that it was in effect conceded that the particular amounts claimed were proper to be awarded as reparation, if the rates charged were determined to be unreasonable and extortionate.

We have already seen that there was evidence to support the Commission's affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant's present attack upon § 829 as repugnant to the due process provision of the Fourteenth Amendment. In the proceeding before the Commission there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired. There is nothing to show that it suffered for lack of compulsory process against witnesses. As to its right to adduce evidence before the court in the action to enforce payment of the award, its complaint in this regard seems to us at least premature. There is nothing to show that it has or could have any defence to the payment of the reparation that it has not already either interposed or waived in the proceeding before the Commission, or to show that it has any evidence to be adduced before the court that it would be prevented from introducing by the

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effect of the restriction contained in § 829. This court does not sit to pass upon moot questions; and, as has been often pointed out, it is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional, and that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Constitution. *Hatch v. Reardon*, 204 U. S. 152, 161; *Southern Railway v. King*, 217 U. S. 524, 534; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544.

The order of the District Court should be, and it is  
*Affirmed.*

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